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No. 80-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY *Petitioner,*

v.

WILLIAM DAVID HENSLEY *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN A. TRIMBLE
Counsel of Record

RICHARD W. TURNER
734 15th Street, NW
Eleventh Floor
Washington, D.C. 20005
(202) 347-2882
Attorneys for Petitioner

Of Counsel:

HAMILTON AND HAMILTON
734 15th Street, NW
Washington, D.C. 20005

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QUESTION PRESENTED

Whether the divided court below was correct in reweighing the evidence and reversing an Administrative Law Judge's findings of fact on a disputed medical issue in a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, when (1) the "substantial evidence" rule limits judicial review of such findings to a determination only as to whether such findings were supported by substantial evidence; (2) the factual determination under review was made following a full evidentiary hearing during which three differing medical opinions from properly qualified experts were received in evidence without objection, and was made after the factfinder assessed the witnesses' demeanor and analyzed the experts' reasoning underlying their opinions; and (3) the widespread rule of American jurisprudence is that an expert opinion is not binding upon the finder of fact, but where it has been accepted as basis for decision, it constitutes "substantial evidence" for purposes of judicial review.

PARTIES BELOW

In the Court below, Petitioner Washington Metropolitan Transit Authority appeared as Respondent, and William D. Hensley, Respondent herein, appeared as Petitioner. The Director, Office of Workers' Compensation, U.S. Department of Labor, did not appear in the Court below.

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No. _____

WASHINGTON METROPOLITAN AREA
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v.

WILLIAM DAVID HENSLEY *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Washington Metropolitan Area Transit Authority (hereinafter "Metro") prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on March 17, 1981 (Appendix A).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) has not yet been reported in the offical reports, but has been

reported at 13 BRBS 182. The Decision of the Benefits Review Board of the Department of Labor (Appendix B) is reported at 11 BRBS 468. The Opinion and Order of the Administrative Law Judge of the Office of Workers Compensation Programs (Appendix C) is not yet reported.

JURISDICTION

The judgement of the Circuit Court of Appeals was entered on March 17, 1981. No petition for re-hearing was filed in that Court. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901, *et seq.* is made applicable to the District of Columbia pursuant to the provisions of the District of Columbia Code §36-501, *et seq.* The applicable statutory provisions, including those of the Administrative Procedure Act, 5 U.S.C. §500, *et seq*, together with the relevant regulations involved in this case are fully set forth in the Statutory Appendix, at pp. 1a-6a.

STATEMENT OF THE CASE

William D. Hensley, a 55-year old bus driver for Metro, had suffered for many years with psoriasis, a skin condition. Following a worsening of this condition, he ceased working in August, 1977. He returned to his job a week later, and again ceased working in early September, 1977. He filed a claim for temporary total disability under the Act, alleging that his employment had aggravated the pre-existing psoriasis, and was thus compensable.

There was no dispute as to Mr. Hensley's claim that his physical condition precluded him from performing his duties as a bus driver. The dispute which arose involved the question of fact as to whether his psoriasis had been aggravated or exacerbated by his occupation, thus the case was set for trial before an Administrative Law Judge of the Department of Labor.

Following a full evidentiary hearing, the Administrative Law Judge assessed the demeanor of the witnesses, analyzed the reasoning given in support of the differing opinions testified to by the expert medical witnesses, and found that Mr. Hensley's condition was unrelated to his occupation, thus noncompensable under the Act. The presumption of compensability under section 20 of the Act was considered, but was found to be inapplicable because substantial evidence to the contrary had been introduced at the hearing.[1] The evidence considered included three expert opinions representing three divergent views: (1) his treating dermatologist, who opined that the psoriasis was aggravated by his occupational duties;[2] (2) a consulting physician, who submitted a report opining that the claimant's work "could result" in a flaring of the condition;[3] and (3) a nationally prominent dermatologist of many years' expertise, who disagreed with the other doctors, testifying that in his opinion Mr. Hensley's condition was not related to his occupation.[4]

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[1] Appendix C, p. 64a

[2] Appendix C, p. 70a

[3] App. C, p. 84a-85a

[4] The latter opinion, accepted by the Administrative Law Judge was based upon the expert's review of Mr. Hensley's medical history, a physical examination of the claimant, photographs, his medical records and reports, as well as the expert's review of

The case then proceeded on appeal to the Benefits Review Board of the United States Department of Labor which held by majority decision, that the record, considered as a whole, contained substantial evidence to support the findings and decision of the Administrative Law Judge, and affirmed his decision (Appendix B, pp. 47a-60a).

Mr. Hensley petitioned for review to the United States Court of Appeals for the District of Columbia Circuit pursuant to 33 U.S.C. §921(c). The Circuit Court, in its divided decision, re-weighed the medical evidence and reversed the administrative determination, entering judgment for the claimant. In essence, the majority decision below held that the expert medical opinion of the nationally prominent dermatologist did not constitute "substantial evidence" so as to overcome the statutory presumption. The Circuit Court further stated that even if the presumption were ignored, the Administrative Law Judge was nevertheless required to find that the weight of the evidence was in claimant's favor by reason of the testimony of the treating physician (Appendix A., p. 25a, n. 13.)

REASONS FOR GRANTING THE WRIT

I

The Decision Below Decided A Federal Question In Conflict With Applicable Decisions Of This Court

The majority decision below conflicts directly with this Court's decisions on the "substantial evidence" rule applicable to the Circuits in reviewing administrative fin-

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medical treatises on the subject. There was no objection to his qualifications, his opinion, or to the facts constituting the basis therefor. App. D, p.72a-83a

dings of fact under the federal Longshoremen's and Harbor Workers' Compensation Act,[5] as well as the Administrative Procedure Act.[6] The decision departed from the parameters established by this Court on virtually every phase and underlying consideration of the "substantial evidence" rule when it reversed an administrative finding of fact made after a full evidentiary hearing, which took into account the demeanor of the witnesses, and was based upon a detailed analysis of the reasoning given in support of the disparate expert opinions submitted into the record.

The decisions of this Court have placed a definite limitation upon the scope of judicial review of factual determinations under both the Longshoremen's and the Administrative Procedure Acts, precluding the reviewing courts from doing precisely that which was done by the majority decision below, *i.e.*, re-weighing the conflicting evidence and deciding the case on the basis of what that Court deemed to be the weight of the evidence, thereby substituting its judgment for the findings made by the Administrative Law Judge.[7] Such substitution of judgment by the Court is even more questionable when, as

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[5] 33 U.S.C. §901, *et seq.*

[6] The 1972 Amendments to the Longshoremen's Act provide that hearings thereunder are subject to the Administrative Procedure Act, 5 U.S.C. §554. *See* 33 U.S.C. §919(d).

[7] The finding of no relationship or causation between Mr. Hensley's employment and the aggravation of his psoriasis was based primarily upon the expert medical opinion of Dr. Robert Stolar (whose qualifications and nationwide reputation as a consulting dermatologist were neither questioned nor challenged [App. D, p. 73a]). He testified without objection that there was no causal connection between the condition he found and the claimant's employment (App. D, p.75a-76a,83a), thus disagreeing with the opinions of the other physicians (App. D, p.76a,80a).

here, the administrative finding was affirmed by the Benefits Review Board on the basis that it was supported by substantial evidence in the record considered as a whole.[8]

While Section 20 of the Longshoremen's Act contains a presumption of compensability "in the absence of substantial evidence to the contrary", this Court has made it abundantly clear that the presumption controls only when there is an entire lack of competent evidence, but in cases like the one here where there is evidence both pro and con, the presumption disappears from the case and the administrative factfinder ". . . is alone empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court." *Del Vecchio* v. *Bowers,* 296 U.S. 280, 286-287 (1935).

The decision below, while paying lip service to *Del Vecchio, supra,* departed completely from this Court's long-established standard as to what constitutes "substantial evidence"[9], as well as this Court's holdings that a qualified expert's opinion, in and of itself, is suf-

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[8] The statute provides that ". . . The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921(b) (3). The Act and the regulations applicable to the hearing provide that the Administrative Law Judge shall not be bound by common-law or statutory rules of evidence, except as provided in 5 U.S.C. §554. *See* 33 U.S.C. §919(d), §923 and 20 C.F.R. §702.339.

[9] That is, ". . . such relevant evidence which a reasonable mind might accept as adequate to support a conclusion"; or ". . . enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

ficient to constitute "substantial evidence" so as to preclude reversal of factual findings based thereon, under either the Longshoremen's Act or the Administrative Procedure Act. See *Banks* v. *Chicago Grain Trimmers Association,* 390 U.S. 495, 497 (1968); *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619-620 (1966); and *Federal Power Commission* v. *Florida Power & Light Co.,* 404 U.S. 453, 464-467 (1972).[10]

A reading of the majority decision below discloses not only that it departed from the prior decisions of this Court, but that it did so on the very basis criticized by the Court in *Consolo* v. *Federal Maritime Commission, supra.* In justifying its holding that there was no substantial evidence contrary to the opinion of the claimant's doctor, the decision below re-weighed the evidence on a selective basis, (e.g., referring only to an earlier report of Dr. Stolar and completely omitting any reference to his expert testimony given at trial that Mr. Hensley's condition was not related to the claimant's employment). Moreover, the majority decision below makes it clear that the Circuit Court was second-guessing the factfinder as to the weight of the evidence (*e.g.*, ". . . the Administrative Law Judge badly misunderstood the import of the treating physician's testimony. . ." [App. A, p. 23a], and ". . . there is little doubt in our minds that even if the Administrative Law Judge had entirely ignored the statutory presumption he

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[10] *In Federal Power Commission*, this Court discussed the several hundred year history of expert opinion testimony, its role, and function in the adjudicative process. Long before that case, this Court held that an expert's opinion was a sufficient basis to support an administrative decision even when based on hearsay, where there was no objection either to the expert's qualifications or to the introduction of the hearsay upon which the opinion was based. See *Spiller* v. *A.T. & S.F. Ry. Co.*, 253 U.S. 117, 130-131 (1920).

would still have to find that the weight of the evidence was in Hensley's favor, since the testimony of two treating physicians is normally entitled to greater weight than the testimony of one physician who examines the claimant only once many months later.").[11] The Court below then went on to formulate its own medical judgment based largely upon medico-legal texts which were not in evidence, and about which none of the medical experts testified. (See references to P. Cantor, *Traumatic Medicine and Surgery for the Attorney,* [1962] Appendix A, at pp. 8, 19).

In rejecting this very approach toward appellate review of administrative findings based on expert opinion, this Court held in *Consolo, supra,* (383 U.S., at 618-620):

> "In effect, the standard of review applied and articulated by the Court of Appeals in this case was that if 'substantial evidence' supports a conclusion

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[11] App. A, p. 25a at n.13. This statement, based upon a 1967 Social Security Act case, is contrary to the prevailing rule that an expert's testimony is never binding upon a trier of fact (see Section II below, at p. 10). Carried to its logical conclusion, it would deprive the Commission of its ability to procure its own experts to render an opinion which would later be entitled to any weight in a Court review, although Congress specifically authorized the Commisssion to obtain such later independent physical examinations and opinions. *See* 33 U.S.C. §907(e) and 20 C.F.R. §702.408, *et seq.* Moreover, *Richardson* v. *Perales*, 402 U.S. 389 (1971), involving the Social Security Act, makes it clear that a mere medical report, unaccompanied by testimony, is nevertheless sufficient to constitute substantial evidence, when no effort was made to subpoena the witness. Even the dissent in that case indicates no quarrel with a finding based upon sworn testimony such as that involved here, where the administrative proceedings have let " . . . trial by ordeal of cross-examination distill the truth." (402 U.S., at 414).

contrary to that reached by the Commission, then the Commission must be reversed. This standard is not consistent with that provided by the Administrative Procedure Act."

* * *

". . . This [substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence [citing]"

* * *

"Congress was very deliberate in adopting this standard of review. It frees the reviewing courts from the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal, and it helps promote the uniform application of the statute. . . . These policies would be damaged by the standard of review articulated by the court below."

Whether considered under the Longshoremen's Act or the Administrative Procedure Act, the approach utilized below in reversing the administrative finding of fact far exceeded the narrow bounds afforded by the substantial evidence rule. The re-weighing of expert medical testimony adduced before an administrative tribunal by the majority below involves an important federal question and sets a precedent which conflicts with applicable decisions of this Court so as to call for review thereof.

II

The Decision Below Is In Conflict With The Holdings Of Other Federal Circuits

The decision below, whether it be viewed as holding only that a medical expert's opinion does not constitute substantial evidence, or whether it be viewed as holding that one expert opinion, rather than another, is binding upon the trier of fact, is directly in conflict with the holdings of the other Circuits, whether viewed under general principles pertaining to expert testimony, or viewed under the Longshoremen's Act or the Administrative Procedure Act.

As was stated in *Mims* v. *United States,* 375 F.2d 135, 140 (5th Cir., 1967):

> ". . . [O]ne of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of *credibility* and *weight* of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted." (Emphasis in original)

Other Circuits have likewise recognized this rule. See, *e.g., Boston Ins. Co.* v. *Read,* 166 F.2d 551, at 553 (10th Cir., 1948); *Dusky* v. *United States,* 295 F.2d 743, 754 (8th Cir., 1961); and *Feguer* v. *United States,* 302 F.2d 214, 242 (8th Cir., 1962).

As to the Longshoremen's Act,[12] the decision below is in direct conflict with the Third Circuit's decision in

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[12] The desirability of uniform interpretation is enhanced by the considerations involved under the Longshoremen's Act.

* * *

"An Act designed to provide equal justice to every longshoreman similarly situtated". *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 735 (1967).

Walker v. *Universal Terminal & Stevedoring Corp.*,_____ F.2d _____, 13 BRBS 257 (No. 80-2142, decided April 10, 1981), a copy of which is reproduced in Appendix E. In *Walker*, the Administrative Law Judge ruled in favor of the employer, finding that the decedent's death was not compensable on basis of medical expert opinion presented by the employer. The Benefits Review Board reversed, holding the Administrative Law Judge's decision was not supported by substantial evidence. After noting the disagreement between the conflicting opinions of the experts, the Third Circuit held (App. E., p. 111a-112a):

> "We hold further that, with the presumption out of the case, the Administrative Law Judge was amply supported by substantial evidence in the record as a whole for his conclusion that intoxication was the sole cause of Walker's death. Again the testimony of Dr. Halpern directly supports that conclusion. . . . The Administrative Law Judge was thus forced to make a choice based upon the credibility of the two doctors. Had the Administrative Law Judge decided to accept the version of Dr. Santo we could not say there was not substantial evidence in support of that theory [citing]. . . But the Administrative Law Judge did not accept his testimony. . ."

To the same effect are Longshoremen's Act holdings of the Ninth Circuit in *Bumble Bee Seafoods* v. *Director, Office of Workers' Compensation Programs,* 629 F.2d 1327, 1330 (1980), as well as the Fifth Circuit's decision in *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741, 742 (1962). The former holds that the administrative decision as to plaintiff's employability was supported by substantial evidence where based on one of several con-

flicting medical opinions, and the latter adheres to the principle that an administrative determination based upon medical opinion is not subject to reversal, even though such finding may have been contrary to the weight of the medical testimony.

The majority decision below is also in conflict with decisions of other Circuits in cases under the Adminstrative Procedure Act, as exemplified by the Third Circuit's decision in *Corn Products Co.* v. *Department of Health, Education and Welfare,* 427 F.2d 511, 515 (1970), and the Seventh Circuit's decision in *Erikson* v. *Federal Trade Commission,* 272 F.2d 318, 321 (1959), (both holding that expert testimony is alone sufficient to constitute "substantial evidence" under the Administrative Procedure Act), as well as the oft-cited statement of Judge Parker contained in the Fourth Circuit's decision in *United States ex rel Chapman* v. *Federal Power Commission,* 191 F.2d 796, 808 (1951):[13]

> "The [substantial evidence] rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusion of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission."

---

[13] *Affirmed,* 345 U.S. 153 (1953). Later quoted with approval by this Court in *Federal Power Commission* v. *Florida Power & Light Company, supra,* at p.466.

Accordingly, it is submitted that the divided decision below is in conflict with the decisions of other Circuits on the same matter, and has so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

STEPHEN A. TRIMBLE
RICHARD W. TURNER
734 15th Street, N.W.
Eleventh Floor
Washington, DC 20005
(202) 347-2882

Of Counsel:

HAMILTON AND HAMILTON
734 15th Street, N.W.
Eleventh Floor
Washington, DC 20005

STATUTORY APPENDIX

Longshoremen's and Harbor Worker's Act
33 U.S.C. §901, *et seq.*

D.C. Code, §36-501

Administrative Procedure Act
5 U.S.C. §500, *et seq.*

Regulations

20 C.F.R.§702.339
20 C.F.R.§702.408

STATUTORY APPENDIX

Longshoremen's And Harbor Workers' Act.
33 U.S.C. 901, *et seq.*

D.C. Code, §36-501

Administrative Procedure Act 5 U.S.C. §500, *et seq.*

Regulations
20 C.F.R. §702.339
20 C.F.R. §702.408

Longshoremen's And Harbor Workers' Compensation Act
33 U.S.C. §901, *et seq.*

8333 U.S.C. §902. Definitions

When used in this chapter —

* * *

(2) The term "injury" means accidental injury or death [arising out of and in the course of employment,] and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

33 U.S.C. §903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury* *.

* * *

33 U.S.C. §907. Medical Services And Supplies

* * *

Physical examination; medical questions; report of physical impairment; review or reexamination; costs

(e) In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted. Such review or reexamination shall be completed within two weeks from the date ordered unless the Secretary finds that because of extraordinary circumstances a longer period is required. The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases, or to the special fund in section 944 of this title.

* * *

33 U.S.C. §919. Procedure In Respect Of Claims

* * *

Provisions governing conduct of hearing; administrative law judges

(d) Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that Title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. §920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * *

33 U.S.C. §921. Review Of Compensation Orders

* * *

Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(b)(1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.

* * *

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.* * *

Court of appeals; jurisdictions; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments:

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days follow-

ing the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified.* * *

* * *

33 U.S.C. §923. Procedure Before Deputy Commissioner Or Board

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

* * *

(Act Of March 24, 1927, c.509, 44 Stat 1424, as amended)

D.C. Code §36-501

§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of

Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (Act of May 17, 1928, 45 Stat. 600, ch. 612, §1.)

Administrative Procedure Act 5 U.S.C. §500, et seq.

5 U.S.C. §554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . .

* * *

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

* * *

5 U.S.C. §556. Hearings; Presiding Employees; Powers And Duties; Burden Of Proof; Evidence; Record As Basis Of Decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a

matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . .

* * *

5 U.S.C. §557. Initial Decisions; Conclusiveness; Review By Agency; Submissions By Parties; Contents Of Decisions; Record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b). . .

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . .

* * *

5 U.S.C. §706. Scope Of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and deter-

mine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; * * *

. . . .

(Act of September 6, 1966 Pub. L. 89-554, 80 Stat 381, as amended).

Regulations

20 C.F.R. §702.339 Formal Hearings Evidence.

In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and these regulations; but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties.

20 C.F.R. §702.408 Evaluation Of Medical Questions; Impartial Specialists.

In any case in which medical questions arise with respect to the appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment, for an injury covered by the Act, the Director, OWCP, through the deputy commissioners having jurisdiction, shall have the power to evaluate such questions by appointing one or more especially qualified physicians to examine the employee, or in the case of death to make such inquiry as may be appropriate

to the facts and circumstances of the case. The physician or physicians, including appropriate consultants, should report their findings with respect to the questions raised as expeditiously as possible. Upon receipt of such report, action appropriate therewith shall be taken.

APPENDIX A

Opinion Below of the United States Court of Appeals For The District Of Columbia Circuit

APPENDIX A

OPINION BELOW OF THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2552

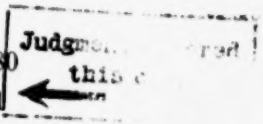
WILLIAM DAVID HENSLEY, PETITIONER

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, RESPONDENT

Petition for Review of an Order of
the Benefits Review Board

Argued December 8, 1980
Decided March 17, 1981



Decided March 17, 1981 *Carolyn McKenney*, with whom *Joseph H. Koonz, Jr.* and *Roger C. Johnson* were on the brief for petitioner.

Richard W. Turner, with whom *Daniel V. S. McEvily* was on the brief for respondent.

Before: MACKINNON and WALD, *Circuit Judges*, and JUNE GREEN*, United States District Judge for the District of Columbia

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Circuit Judge* WALD.

Dissenting Opinion filed by *Circuit Judge* MACKINNON.

WALD, *Circuit Judge*: Petitioner William Hensley appeals a decision and order of the Benefits Review Board of the United States Department of Labor which upheld a denial of his compensation claim brought under the Longshoremen's and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. §901 *et seq.*[1] Hensley claims a temporary, total disability due to psoriasis which, he alleges, was aggravated by his employment as a bus driver for the Washington Metropolitan Area Transit Authority ("WMATA"). An Administrative Law Judge found that the aggravation of Hensley's pre-existing psoriatic condition was not work related. Appendix ("App.") at 16–19. The Benefits Review Board, in a 2–1 decision, affirmed the finding of the Administrative Law Judge, holding that there was substantial evidence to support his decision. App. at 1–15. Because the Benefits Review Board and the Administrative Law Judge erred in evaluating the evidence before them, and therefore failed properly to apply the statutory presumption favoring the claimant in a case where no substantial evidence was presented to contradict his claim, the decision is reversed.

I. THE FACTS

Petitioner Hensley, husband and father of seven children, has been a bus driver for the past 33 years, employed for that entire period by respondent WMATA or its predecessor, D.C. Transit Authority. Since 1968 Hensley has been plagued by general psoriasis. Until August, 1977, however, his condition was well controlled by medication, and he never missed a day of work due to his skin condition. App. at 103. Hensley testified before the Administra-

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[1] The Act's provisions are applicable to employers in the District of Columbia pursuant to 36 D.C. Code § 501 *et seq.*

tive Law Judge that during June and July of 1977, his bus route came under construction, making the ride extremely rough.[2] App. at 103–04. He further stated that the particular bus assigned to his route had very poor suspension, an uncomfortable driver's seat, and a steering ratio requiring far greater effort for turns than other buses used by WMATA; all of this was acknowledged to be true by the Board. *Id.* at 3 n.3; 104–06. Hensley testified that he was therefore exposed to severe bouncing at certain points of contact, especially his left hand, the small of his back, the underside of his thighs, and his feet. *Id.* at 106–08.

> [D]uring the course of this time my skin began to dry out and peel and crack; and it was very hard for me—in other words, it would hurt to hold the steering wheel. And I was trying to drive with a thumb and finger proposition [sic]. But when I would grip the wheel and be out there on the job for a while, then it would crack open and bleed from the work, from doing the job, from holding the steering wheel; it would actually crack open and my hand would bleed.

Id. at 108.

On August 15, 1977, Hensley ceased work on the advice of his treating physician, Dr. Donald Mitchell. Dr. Mitchell found petitioner to be in severe pain and unable to use his hands and feet; his psoriasis was extensive with pustular lesions on the palms and the soles of his feet. App. at 30–3. Hensley was started on medication and he returned to work on August 23, 1977, despite advice from Dr. Mitchell that his condition would worsen if he began driving again. Id. at 49. But on September 5, 1977, Hensley was forced to stop work again due to the condition of his hands and feet, and he remained off work until November, 1978. Once Hensley stopped working, his condition stabilized. *Id.* at 111.

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[2] Hensley testified, "[I]t just shook the heck out of your hands. It could even break your arm almost." App. at 107.

II. The Law

This court's role in reviewing determinations of the Benefits Review Board under the Longshoremen's Act is limited. We examine the record only to assure that the Board's orders rest on substantial evidence on the record as a whole, and that the Board's underlying standards for granting or denying compensation are in accord with the law. *See Wheatley* v. *Adler*, 407 F.2d 307, 310 (D.C. Cir. 1968) (en banc). We have not hesitated, however, to reverse the Board's orders when they fail properly to apply the Act's presumption favoring claimants in disputed cases. *See, e.g., Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *cert. granted*, S.Ct. No. 80-518 (March 9, 1981); *Swinton* v. *Kelly*, 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Wheatley* v. *Adler*, *supra*.

The Act provides that compensation shall be payable when an employee covered under the Act suffers an "injury," defined as "accidental injury . . . arising out of and in the course of employment . . . ." 33 U.S.C. § 902(2). Section 20 of the Act further provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter *it shall be presumed, in the absence of substantial evidence to the contrary*—(a) *That the claim comes within the provisions of this chapter.*" 33 U.S.C. § 920 (emphasis supplied). The Section 20 presumption is but one indication of the "humanitarian nature" of the Act generally, *O'Keeffe* v. *Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359, 362 (1965), and the "beneficent purposes" which underlie it. *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955).

The presumption operates in favor of the claimant unless and until "substantial evidence" is presented by the respondent showing that the claimant's malady did not arise out of and in the course of his employment. At that point, the presumption "falls out of the case." *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935); *Swinton* v. *Kelly*,

supra, 554 F.2d at 1082 n. 35; *Maryland Shipbuilding & Drydock Co.* v. *Jenkins*, 594 F.2d 404, 407 (4th Cir., 1979); *St. Louis Shipbuilding Co.* v. *Director, Office of Workers' Compensation Programs*, 551 F.2d 1119, 1124 (8th Cir., 1977); *Travelers Insurance Co.* v. *Belair*, 412 F.2d 297, 301 n.6 (1st Cir., 1969). This circuit has not decided whether, once the presumptive "bubble" bursts and falls out of the case, the ultimate burden of persuasion as to work-relatedness rests with the employer or employee. *Cf. Parsons Corp. of California* v. *Director, Office of Workers' Compensation Programs*, 619 F.2d 38, 41 (9th Cir., 1980) ("Even after the substantial evidence is produced to rebut the statutory presumption, the employer still bears the ultimate burden of persuasion."). But many courts, including our own, have decided that the beneficient purposes and humanitarian nature of the Act must be borne in mind when deciding whether the employer has presented "substantial" evidence; thus doubtful questions, including factual ones like work-relatedness, must be resolved in favor of claimants. *Wheatley* v. *Adler*, *supra*, 407 F.2d at 313–14 ("We have frequently pointed out that since the statute 'should be construed liberally' in favor of employees and their dependents, it is 'in their favor [that] doubts, *including the factual*, are to be resolved.' *This approach has . . . characterized our application of the substantial evidence test in these cases.*" [emphasis supplied]). *See also Swinton* v. *Kelly*, *supra*, 554 F.2d at 1084–85 (citing numerous cases); *Ryan-Walsh Stevedoring Co.*, v. *Trainer*, 601 F.2d 1306, 1316 (5th Cir. 1979); *Army & Air Force Exchange Service* v. *Greenwood*, 585 F.2d 791, 794 (5th Cir., 1978); *Bath Iron Works Corp.* v. *White*, 584 F.2d 569, 574 (1st Cir., 1978); *Young & Co.* v. *Shea*, 397 F.2d 185, 188, *rehearing en banc denied*, 404 F.2d 1059, 1061 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) ("The policy of the Act that all doubtful questions are to be resolved in favor of the [claimant] is to be considered in determining whether there was substantial evidence before the Commissioner." 404 F.2d at 1061). Ap-

plying this approach, this court has often found it necessary to reverse orders which are based on evidence too insubstantial to override the statutory presumption; we "will not sustain the administrative findings merely because they are substantiated by some isolated evidence." *Friend* v. *Britton*, *supra*, 220 F.2d at 821. *See*, *e.g.*, *Swinton* v. *Kelly*, *supra*, 554 F.2d at 1085 n.61 (collected cases decided in this circuit). On the contrary, in order to overcome the presumption, the employer's "substantial evidence" must be "specific and comprehensive enough to sever the *potential* connection" between the disability and the work environment. Id. at 1083 (emphasis supplied); *Parsons Corp. of California* v. *Director, Office of Workers' Compensation Programs*, *supra*, 619 F.2d at 41.

III. The Law Applied In This Case

It is uncontested that Hensley's severely aggravated psoriasis condition is an "injury," as that term is used in the Act; further, under the well recognized "aggravation rule" it is indisputable that "an aggravation of a pre-existing condition may constitute a compensable accidental injury under the Act [.]" *Wheatley* v. *Adler*, *supra*, 407 F.2d at 312. *See Director, Office of Workers' Compensation Programs* v. *Brandt Airflex Corp.*, No. 78-2309 (D.C. Civ. Feb. 26, 1981), slip. op. at 8; *Friend* v. *Britton*, *supra*, 220 F.2d at 823; *Robinson* v. *Bradshaw*, 206 F.2d 435, 437 (D.C. Cir.) *cert. denied*, 346 U.S. 899 (1953); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177 (8th Cir. 1979). The fact that other, nonemployment related factors may also have contributed to, or additionally aggravated Hensley's malady, does not affect his right to compensation under the "aggravation rule." *Cordero* v. *Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see Wheatley* v. *Adler*, *supra*, 407 F.2d at 312 n.11 ("'[T]he cases almost invariably decide that the fact that the injury would not have resulted but for the pre-existing disease, or might just as well have

been caused by a similar strain at home or at recreation, are both immaterial.'")

Thus, the only issue in this case is whether or not the *aggravation* of Hensley's psoriasis, which occurred during July and August of 1977 when potholes and construction on his route made driving particularly stressful, arose *even in part* "out of and in the course of" his employment. 33 U.S.C. § 902(2). This statutory language

> *does not require "a causal relation between the nature of employment of the injured person and the accident.* . . . All that is required is that the 'obligations or conditions' of employment create the 'zone of special' danger out of which injury arose." . . . [The line is drawn] only at cases where an employee [has] become "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment."

O'Keeffe v. *Smith, Hinchman & Grylls Assoc., Inc., supra*, 380 U.S. at 362 (emphasis supplied). *See, e.g., Mitchell* v. *Woodworth*, 449 F.2d 1097 (D.C. Cir. 1971) (denial of compensation reversed despite apparent absence of evidence that death arose from any particularly unusual work related stress); *Butler* v. *District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966) (denial of compensation reversed despite apparent absence of any particularized causal theory connecting claimant's mental breakdown with his 20 years of service as a parking lot attendant); *Robinson* v. *Bradshaw, supra* (denial of death benefits reversed for failure to apply presumption to issue of work-relatedness in case where deceased suddenly became obsessed with idea that he was being pursued by mob, resulting in his confinement in jail, where he was thereafter fatally shot by police officer whom he attacked; presumption applied that his job as a truck driver aggravated some pre-existing mental illness).

In deciding whether the aggravation of Hensley's psoriatic condition arose, even in part, out of and in the

course of his employment as a bus driver, the factfinder was required to apply the Section 20 presumption in his favor. *Swinton* v. *Kelly*, *supra*, 554 F.2d at 1082 ("The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Numerous cases cited); *see Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*, *supra*, 627 F.2d at 458; *Ridgley* v. *Ceres, Inc.*, *supra*, 594 F.2d at 1177.

Hensley's allegation of work-relatedness, however, did not rest solely on the statutory presumption; on the contrary, he presented testimony on work-relatedness which overwhelmingly supported his claim. Hensley testified that after 32 years of driving a bus—10 of them with chronic psoriasis but not a day's work lost because of the condition—his psoriasis flared up so badly in the summer of 1977 that he was forced to quit work on his doctor's advice. This was precisely the time when construction began on his route. He also testified that the lesions first appeared on those parts of his body where the physical trauma of driving was most concentrated, his left hand, his lower back and buttocks, and his right foot.[3] App. at 106-08. While driving the bus his hands would "crack open and bleed . . . from holding the steering wheel." *Id.* at 108. Then, when he stopped working, his condition improved; when he returned again, it worsened. All this was

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[3]The dissent makes much of the fact that by the time the company's doctor examined him *nine months later*, he had lesions all over his body. It is entirely consistent with the pattern of psoriasis that the emotional stress caused by the appearance of some lesions in one area precipitates lesions in other areas as well. Thus a person may simultaneously have some lesions that are a result of Koebner's syndrome, i.e., caused or aggravated by physical trauma, nn.4,11 *see infra*, and others that are not. *See generally* 6 P. Cantor, *Traumatic Medicine and Surgery for the Attorney* 640-41 (1962).

uncontradicted testimony, and by itself should have been sufficient evidence to show work-relatedness. *See Eller and Co.* v. *Golden*, 620 F.2d 71, 74 (5th Cir. 1980) (claimant's own testimony may constitute substantial evidence justifying award of compensation under the Act).

In addition to Hensley's testimony, however, two accredited dermatolgoists, one of whom was actually treating Hensley's psoriasis at the time he had to stop work, stated that in their expert medical opinion the flare-up was, or certainly could have been, aggravated by Hensley's driving a bus.[4] The principal treating physician,

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[4] Dr. Mitchell stressed repeatedly in his deposition that he felt claimant's underlying condition was aggravated by the conditions of his employment:

> Q. Doctor, do you have an opinion that you can state with resonable degree or certainty as to whether or not Mr. Hensley's work as a bus driver aggravated his underlying condition of psoriasis?
>
> A. Let me preface my statement by saying, I don't think Mr. Hensley's psoriasis is due to his driving a bus, but I certainly think that Koebner's phenomenon plays a part in this, *and that this is service-aggravated*, as we used to call it in the Army.
>
> Q. So his work did not cause the psoriasis *but it certainly did aggravate the condition?*
>
> A. *Oh, yes.*

App. at 31-2 (emphasis supplied).

> Q. Let me ask just one or two more questions, Doctor. Then the occupation of driving a bus for this particular man, you think that his hands were affected by gripping the wheel?
>
> A. Yes, that's right.
>
> Q. You mean by that that some of the roughening skin of the lesions on the hands were rubbed to some extent?
>
> A. No, I think what occurred was this man—and in psoriasis, you can never generalize to every patient,

Dr. Mitchell, testified that he advised Hensley at the time to stop working, warning that the condition would worsen if Hensley continued to drive. When Hensley persisted in staying on the job, the condition did worsen; when he finally stopped for good, it stabilized and improved somewhat. App. at 31-3, 36, 49, 111. Dr. Mitchell also corroborated many particulars of Hensley's testimony, for example, that the pustular lesions on Hensley's hands and feet

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> because every patient with psoriasis is slightly different—*I think the constant trauma of gripping and driving the bus made him worse.*
>
> Now, if he had been a carpenter, using a hammer and a saw, I think it would have gotten worse from using a hammer and a saw.

App. at 52 (emphasis supplied).

> Q. I just have two questions, Doctor. Dr. Mitchell, you have testified that *the constant trauma of gripping the steering wheel made Mr. Hensley's condition worse?*
>
> A. *Yes.*

App. at 56 (emphasis supplied). *See also* Letter of Dr. Donald Mitchell, App. at 155 ("This condition is work aggravated as is demonstrated by the extensive psoriasis involving the palms and soles.").

Dr. Thomas P. Nigra, M.D., to whom claimant was referred by Dr. Mitchell, said:

> When I saw him, he had physically disabling psoriasis of his left hand. He is a Metro Bus driver, and there is little question that he uses his hands in his work.
>
> Psoriasis is a capricious disease which waxes and wanes and comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive proriasis will result in a flare of psoriasis in the traumatic area. It is my opinion that using his hands in his work the way Mr. Hensley does as a bus driver could result in trauma and therefore flaring of his basic condition.

App. at 154.

were more severe than the lesions on the rest of his body,[5] *id.* at 48, and that his left hand was more severely affected than his right, *id.* at 56.[6]

In sum, Dr. Mitchell's overall testimony was consistent with at least two theories of work-related aggravation, namely, that pustular lesions appeared initially as a response to the physical trauma of driving, or that driving aggravated existing lesions to the point that they cracked, bled and made driving impossible. It is possible both things happened. In either case, work-related aggravation of an underlying psoriatic condition is clearly established on this record. It is, frankly, difficult for us to discern how the Administrative Law Judge and the Benefits Review Board could deny his claim based on this evidence, especially when the statute as construed by our court and others, *see* cases cited at pp. 5, 7–8, *supra*, presumes causality "in the absence of substantial evidence to the contrary." 33 U.S.C. § 920.

We can find no *substantial* evidence to the contrary in this case. The only evidence adverse to Hensley that appears in the record is the testimony of Dr. Robert Stolar, hired by WMATA, who examined Hensley only once with regard to his claim. This examination took place *nine months after the flare-up and eight months after he left work*. The WMATA doctor's conclusions were as follows:

> In my experience the pattern of work that he carried on does not produce prosiatic lesions by the only

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[5] Contrary to the dissent's contention, Diss. Op. at 2, pustular lesions *are* blister-like and Dr. Mitchell testified that gripping a wheel can cause blisters, and blisters, in turn, signify a dermal injury which can give rise to Koebner's syndrome. *See* n. 11 *infra*.

[6] Hensley testified that he had to do most of the gripping of the wheel and steering with his left hand, while his right hand remained free to open and close doors and to service customers. App. at 101–02, 107.

> known traumatic mechanism which I mentioned for the Koebner phenomena, which would require a different type of injury than what I could visualize that he received at any time. . . . So in attempting to visualize Mr. Hensley's constant work pattern, his constant frictional pattern was of the smoothing or sliding variety, which is used very often as part of the treatment for psoriasis. So I could not visualize that particular pattern of injury that would aggravate his condition.

App. at 73-4.[7]

This testimony does not constitute substantial evidence contradicting claimant's theory of work-relatedness. The WMATA doctor's "experience" that bus driving would not "*produce* psoriatic lesions" (emphasis supplied) in no way contradicts the claimant's or his own doctors' testimony that gripping the wheel and pressing the accelerator and brakes *aggravated existing pustular lesions* on his hands and feet to the point where he could not drive.[8] Indeed the Board itself called the WMATA doctor's testimony on this basic issue in the case "not crystal clear." App. at 7.

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[7] At the time he first examined him, Dr. Stolar wrote to the WMATA lawyer:

> There is no question that Mr. William D. Hensley has an unfortunate and to a great extent disabling condition of psoriasis; however, in attempting to evaluate it from his history and examination, *I was unable to determine that it was work related or work aggravated.*

App. at 160 (emphasis supplied). Needless to say, the doctor's *inability to determine* that Hensley's condition was work-related does not satisfy the employer's burden of showing with substantial evidence that his condition *was not* work-related.

[8] Ironically, Dr. Stolar testified that if Hensley had been his own patient, he too "probably would have stopped him from work long before, and tried to clear his skin." App. at 83. But if Dr. Stolar really believed that work did not aggravate his condition, there would be no reason for such advice.

More importantly, however, there is no evidence in the record that this third doctor had any particular experience or knowledge upon which to base his opinion regarding Hensley's "work pattern" as a bus driver, or his opinion regarding the "constant frictional pattern" to which Hensley was subjected on his particularly rough bus route during July and August of 1977. Dr. Stolar, while an accredited dermatologist, was not shown to have had any experience from which to estimate what sort of trauma Hensley was receiving from driving on his particular bus route, or which parts of the body received stress from such driving. At one point the Administrative Law Judge had to point this out:

> Judge Giesey: Counsel, Dr. Stolar is an impressively credentialed member of a learned profession; but I do not think this is part of what he learned. I know as much about driving as the Doctor does. . .

App. at 84. Therefore, since this doctor's ultimate opinion on work-relatedness was based entirely upon his "visualiz[ation]" of the kind of physical trauma involved in Hensley's job, and since this "visualiz[ation]" was not derived from any particular experience of knowledge,[9] we find that Dr. Stolar's opinion on the issue of aggravation is not entitled to the "substantial" weight which it must have to overcome the Congressionally mandated presumption. Hensley's claim should therefore have been sustained on

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[9]The WMATA doctor's "visualiz[ation]" of Hensley's physical trauma as being "of the smoothing or sliding variety" was contradicted by the only witness whom the record shows had *actual knowledge* of the driving conditions: Hensley himself. If there was any question about Hensley's description of the physical trauma he underwent on the route, surely it would have been incumbent upon WMATA to produce a witness to contradict that description. WMATA must be presumed to have at its disposal witnesses who can testify as to the stresses its drivers are subjected to on its bus routes.

the strength of that presumption, together with the evidence of his two treating physicians and his own testimony.

IV. The Decisions of the Administrative Law Judge and the Benefits Review Board

Given our conclusion that there was not "substantial" evidence to overcome the presumption of causality or the supporting evidence of claimant and his medical witnesses, we must conclude that the Administrative Law Judge erred in finding that "the weight of substantial evidence preponderate[d] on the side of non-exacerbation." App. at 19. In fact, the Administrative Law Judge's reasons for denying the claim are well nigh indecipherable to us. The Review Board itself admitted that his analysis was "not a model of clarity." App. at 11 n.8. He reasoned thus:[10]

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[10] Prior to arriving at his "Findings of Fact and Conclusions of Law," *see* text immediately *infra*, the Administrative Law Judge cited Hensley's testimony that the streets on his route were "chopped all to pieces," that the "bus assigned his route had notably poor suspension," and that as a result "various parts of his body were 'banged,' . . . he was 'continually bouncing,' and [the] driving 'shook the check out of [his] hands'. . . ." App. at 17. The Law Judge then summarized the three doctors' testimony, and concluded by noting that Dr. Stolar "stated . . . that rubbing, smoothing or abrasion such as encountered in Hensley's work is a part of the treatement for psoriasis, rather than an exacerbating influence." *Id.* at 18. The Administrative Law Judge's account of Dr. Stolar's testimony appears to assume—as did Dr. Stolar—a "rubbing, smoothing" effect from driving that is compeletely at odds with Hensley's first-hand account of what he was undergoing.

Furthermore, it is incorrect to assert that "rubbing, smoothing, or abrasion" *per se* consititutes a treatment for psoriasis, particularly if the "rubbing, smoothing or abrasion" is neither medically prescribed nor administered as in Hensley's case. Dr.

> [T]he treating physician testified that Koebner's phenomenon is produced only by injuries that penetrate the epidermis and injure the dermis but that "it's well established that the mild, repeated trauma to the knees and elbows of patients accounts for the characteristic distribution of psoriasis, and this is a form of Keobner's phenomenon." Aside from the internal inconsistency of this testimony, photographs submitted in evidence with his report show that, while Hensley's elbows have extensive psoriatic lesions, his knees are clear and uninvolved—despite the fact that his work is largely performed in a seated position and at least one leg, according to Hensley, "does all the work." Ironically, this physician's patient's condition is significantly inconsistent with the premise upon which the entire theory of causation is based.

App. at 19. Our reading of the record reveals that the Administrative Law Judge badly misunderstood the import of the treating physician's testimony. There is nothing whatsoever inconsistent in Dr. Mitchell's conclusion that "mild, repeated trauma" which may come from "gripping a wheel of a bus" could produce a dermal injury likely to incite Koebner's syndrome.[11] Dr. Mitchell's testimony was not only internally consistent, but it also significantly

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Stolar testified that one particular form of treatment for psoriasis involves using a polyester fiber sponge "to get rid of the scale, so that *medication which is applied* can be better absorbed and be much more effective." App. at 75 (emphasis supplied); *accord*, App. at 35-6 (testimony of Dr. Mitchell). Since Hensley's exposure to banging, bouncing and shaking was not part of any prescribed medical treatment involving medication and special sponges, his situation is far different from the one outlined in Dr. Stolar's testimony.

[11] The Administrative Law Judge was probably referring to the following portion of Dr. Mitchell's deposition:

> Q. This Koebner's syndrome or phenomenon of which

bolstered claimant's theory of work-relatedness. The remainder of the Administrative Law Judge's reasoning, which relies on the absence of aggravated psoriasis on Hensley's knees, is simply irrelevant; Hensley's claim was that his hands and feet, not his knees, were significantly involved in the driving.[12] Thus the Administrative Law

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you spoke a while ago, you used the illustration of a pin scratch, I believe.

A. Yes.

Q. Is that correct? And in order to produce this phenomenon, you must at least scratch below the first layer of skin, must you not?

A. Below the first several layers of skin. You must go entirely through epidermis, and injur [sic] the dermis.

Q. So that simply gripping a wheel of a bus, using your hands in that manner, doesn't produce scratches, does it?

A. Oh, haven't you ever driven a car as much as I have? I have had blisters on my hands from driving an automobile. I had a little sports car; I had to change the steering wheel because it produced blisters every time I drove the thing. . . .

Q. That produced blisters, but it didn't cut your hands, did it?

A. No, but when you produce a blister, you have got a dermal problem.

App. at 40–1. Needless to say, this testimony is not at all inconsistent with another illustration of the Koebner phenomenon which Dr. Mitchell provided at another point in his deposition: that "it's well established that the mild, repeated trauma to the knees and elbows of patients accounts for the characteristic distribution of psoriasis, and this is a form of Koebner's phenomenon." *Id.* at 35. In fact, Dr. Mitchell's testimony was clear and unambiguous on the issue of whether the aggravation of Hensley's psoriasis was work-related. *See* n.4 *supra*.

[12]The Board itself admitted that the Administrative Law Judge's "stressing of the fact that claimant's knees were not affected by psoriasis is puzzling in light of the fact that claimant's

Judge's final conclusion that Hensley's condition was inconsistent with his "entire theory of causation" is simply a *non sequitur*.[13]

Although the Benefits Review Board in large part disclaimed reliance on the Administrative Law Judge's reasoning, calling it "puzzling," it concluded nevertheless that his reasoning did not "so undermine the . . . ultimate finding so as to require reversal." App. at 11 n.8. Yet the Board itself engaged in equally murky thinking, relying on alleged facts which were irrelevant to the issue in this case, and failing to apprehend the thrust of the testimony on work-relatedness.

As to the former, the issue here has always been clear: whether the physical trauma of driving under unusually difficult circumstances contributed to the aggravation of Hensley's already present psoriatic condition. The Board's opinion, however, highlighted other factors such as obesity and emotional problems which could have contributed

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knees did not appear to be subject to repeated trauma." App. at 11 n.8.

[13]There is little doubt in our minds that even if the Administrative Law Judge had entirely ignored the statutory presumption, he would still have had to find that the weight of the medical evidence was in Hensley's favor, since the testimony of two treating physicians is normally entitled to greater weight than the testimony of one physician who examines the claimant only once, many months later, in connection with the claim. *See generally* Combs v. Gardner, 382 F.2d 949, 956-57 (6th Cir. 1967); Shaw v. Harris, Civ. No. 79-869 (D.D.C., Nov. 6, 1979) at 5 ("as a matter of law the testimony in evidence of a doctor who treats a patient over a substantial period of time is entitled more consideration than the testimony of a doctor who examined a patient once."); *see also* Robinson v. Richardson, 360 F. Supp. 243, 250 (E.D.N.Y. 1973); Claussell v. Secretary of HEW, 337 F. Supp. 717, 722 (S.D.N.Y. 1972); Teague v. Gardner, 281 F. Supp. 43, 48 (E.D. Tenn. 1968).

to the flare-up, App. at 6, though no one testified that they did so in fact. In this way the Board ignored decisions of this circuit and others, *see* pp. 6-7, *supra*, which require a presumption in favor of job-relatedness where multi-causation may exist, and no substantial evidence is introduced demonstrating that non-work related factors are the only causes. The Board also cited the fact that claimant had lesions on parts of his body not subjected to work pressure, i.e., his ankle and stomach. Such lesions are entirely consistent with the "capricious" nature of the disease—a flare-up in one portion of the body can, without apparent cause, spread to other parts. *See* n. 3 *supra*. Finally, the Board relied upon the fact that the condition was still "severe" several months after he stopped driving, but ignored the undisputed evidence that his condition stabilized when he stopped driving the bus. *See* p. 10 *supra*.

In addition to all this, the Board also apparently misunderstood the testimony concerning work-relatedness. Claimant testified that by gripping the wheel of the bus the psoriasis on his hands was traumatized to the point of bleeding. His physician, Dr. Mitchell, corroborated the testimony that he had pustular lesions on his hands and feet, App. at 30. These lesions constituted a dermal injury giving rise to a diagnosis of Koebner's syndrome, one form of which occurs when "mild, repeated trauma" penetrates the dermal level of the skin causing a flare-up in the psoriatic patient's condition. *See* App. at 34-5. Dr. Nigra's statement was consistent with Dr. Mitchell's regarding this causal scenario. *See* n.4 *supra*. But the Board chose to rely not upon this evidence, but instead upon the testimony of the WMATA doctor,[14] and found that he "dis-

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[14]The Board quoted Dr. Stolar's letter to WMATA which stated in part:

> Psoriasis has so many spontaneous increases and decreases, and lesions, and extent [sic] that it is impossible to

agreed with Dr. Nigra's opinion that trauma to an area of skin of a patient suffering from psoriasis will result in a flare of psoriasis in that area." App. at 8. If the WMATA doctor's testimony is so read by the Board, it is clear error. Medical texts on the disease recognize the fact that some kinds of trauma to the skin of a psoriatic patient may precipitate or aggravate the condition, *see, e.g.*, 6 P. Cantor, *Traumatic Medicine and Surgery for the Attorney* 640-41 (1962) ("Chronic pressure caused by gripping tools may precipitate a psoriatic eruption of the palms. . . . The role of trauma in aggravating a pre-existing psoriasis has to be accepted."), and the WMATA physician acknowledged that fact as well. App. at 160.

Thus no testimony or evidence directly contradicted claimant's theory of work-relatedness, that under unusually physically demanding driving, his psoriatic hands broke out in pustular lesions and then cracked and bled from gripping the wheel. This constituted work-related aggravation, and since there was no substantial evidence to contradict this causal scenario, while ample evidence existed to support it, the Board's finding to the contrary is clearly erroneous.

IV. Conclusion

Our review of the record here convinces us that both the Administrative Law Judge and the Benefits Review Board failed properly to apply the statutory presumption concerning work-relatedness in this case. There was no "substantial evidence" contradicting either the presumption or the considerable independent testimony by Hensley and

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> determine that any one pattern of injury may definitely be the responsible agent for its manifestations.

App. at 10. This concession by Dr. Stolar, the employer's only witness, would seem to rule out the notion that he could say work was not a responsible agent. If he could not, then the presumption of work-relatedness applies.

his two doctors supporting the claim that his psoriatic condition was aggravated by driving a bus. The only witness who held the contrary opinion, that the aggravation was not work-related, based his conclusion on a wholly unsupported assumption concerning the actual working conditions under which claimant was laboring. The decision and order of the Board is therefore reversed, and the case remanded for an appropriate award in accordance with this opinion. *Cf. Friend* v. *Britton*, *supra*, 220 F.2d at 824.

So ordered.

MACKINNON, *Circuit Judge* (Dissenting). The opinion of my colleagues, in this case under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, reverses the Administrative Law Judge and the Benefits Review Board by relying on the contention that the Board failed properly to apply the statutory presumption of coverage. They reach such result first by ruling there was no "substantial evidence" contradicting the presumption of coverage, and then by ruling that in any event there was no "substantial evidence in the record considered as a whole" to reject Hensley's claim that his psoriatic condition was *aggravated* by driving his bus over some bumpy pavement. In reaching these conclusions the majority, claiming reliance on "the humanitarian nature of the Act," but in reality relying on compassion, side-step longstanding principles of judicial review that are firmly established by decisions of the Supreme Court in Longshoremen's Act cases. Therefore, I must dissent.

I.

Hensley had driven buses for the Washington Metropolitan Area Transportation Authority (WMATA) for 32 years. Since 1967 he has been plagued by general psoriasis, the cause of which he concedes is *not* work related. Hensley contends that in 1977 the new route he "picked" in the fall of 1976 (App. 17) became bumpy due to chuck holes and traffic of heavy vehicles, that this caused him to be bounced around in driving his bus, and, with supporting testimony from his treating doctors, that this caused a disabling aggravation of his longstanding psoriatic condition. As to the circumstances Hensley testified:

> [D]uring the course of this time *my skin began to dry out and peel and crack:* and it was very hard for me—in other words, it would hurt to hold the steering wheel. And I was trying to drive with a thumb and finger proposition [sic]. But when I would grip the wheel and be out there on the job for a while, then it would crack open and bleed

> from the work, from doing the job, from holding the steering wheel; it would actually crack open and my hand would bleed.

App. 108 (Emphasis added). Hensley fixed August 15, 1977 as the date of his injury (aggravation).

The work related aggravation that is claimed here was capsulated in the following testimony by Hensley's regular treating doctor (Dr. Mitchell):

> In August of 1977, Mr. Hensley came in with more extensive psoriasis. His psoriasis was what we call guttate type of psoriasis, [1] drop like, *all over the body*. And he had extensive pustular lesions on the palms and soles.

(App. 30) (Emphasis added). Note that Hensley's doctor claimed that in August 1977 his patient developed the psoriasis "*all over his body*" that also included the affliction on his palms and soles. The "severe pustular lesions of the palms *and soles*" were the reason his doctor considered "it was impossible [for Hensley] to continue" driving a bus, but these lesions were but one part of the guttate type psoriasis that manifested itself all at the same time. (App. 32) (Emphasis added).

In claiming that such aggravation was job related, Hensley's treating doctors opined that the aggravation resulted from the operation of a medical theory known as the Koebner phenomenon (App. 28, 31, 35, 40, 68, 73). This theory, according to Dr. Mitchell, with whom Hensley's other treating doctor (Dr. Nigra) agreed, holds that "if the dermis in a psoriatic patient is injured, [the patient] will get psoriatic lesions *in the area that was injured.*" (App. 28) (Emphasis added). The Koebner theory requires that there be some force that goes "entirely through [the] epi-

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[1] Guttate lesions are lesions having a drop-like appearance. 6 P. Cantor, Traumatic Medicine and Surgery for the Attorney 643 (1962).

dermis and injure[s] the dermis." (App. 40). There was testimony from Hensley's Dr. Mitchell indicating that blisters can cause Koebner phenomenon (App. 41), but no unequivocal testimony from anyone that Hensley had blisters. My colleagues, trying to explain Hensley's symptoms with a "blister theory," state there is no direct evidence to contradict claimant's theory that "his psoriatic hands first broke into pustular lesions and then cracked and bled from gripping the wheel." Maj. op. at 19; see also *id.* at 11 n.5. But evidence need not be "direct" to be substantial, and Hensley's testimony itself contradicts his blister theory. In relating the causal scenario that led to his disability he spoke of no blisters; rather, he said, "my skin began to dry out and peel and crack." (App. 108.) It is true that "pustular lesions" were later found on his hands and feet. But pus-filled lesions are not necessarily blisters. More likely than not they were the *result* of Hensley's aggravated psoriasis and not the cause. That at least is a reasonable inference, and it is for the Benefit Review Board and not this court to assess the relative weights of contrary inferences. Hensley's failure to testify as to blisters *preceding* the onset of what is claimed to be the operation of Koebner's phenomenon thus dooms his case at its most critical point—his hands. *The testimony of Hensley's Dr. Mitchell* also dooms his case at his feet. See *infra*. *Dr. Mitchell* also testified: "The friction or the abrasive pattern does not appear to exemplify [the "Koebner phenomenon, the trauma, the cutting of the skin"]" (App. 86). *Thus, even ignoring the substantial evidence introduced* against *Hensley, the evidence introduced in his behalf affords a reasonable inference that his aggravated psoriasis was not work-related.*

Dr. Stolar (the WMATA doctor) testified that Hensley's aggravation was not an example of the working of the Koebner phenomenon. The Administrative Law Judge and the Benefits Review Board agreed, finding that Hensley's condition was *not* work-aggravated. Such "findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record con-

sidered as a whole." 33 U.S.C. § 921(b)(3); *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Marcus v. Director* 548 F.2d 1044, 1051 (D.C. Cir. 1976). Therefore, this court must follow the decision of the Administrative Law Judge and the Board unless it is *not* supported by *substantial evidence*. There is a statutory presumption "[t]hat the claim comes within the provisions of the [Act]." 33 U.S.C. § 920(a). This presumption, however, is procedural and falls when the employer introduces substantial evidence to overcome it. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Travelers Ins. Co. v. Belair*, 412 F.2d 297, 301 n.6 (1st Cir. 1969). In an effort to keep this presumption alive, my colleagues poor mouth the testimony of Dr. Stolar, assert that he was "hired by WMATA" (who else would he be hired by?), claim that he was not qualified by "experience or knowledge" to give the expert testimony he did, and then, after reciting the presumption favoring a finding of causality, conclude: "We can find no *substantial* evidence to the contrary":

> [T]here is no evidence in the record that this third doctor [Dr. Stolar] had any particular experience or knowledge upon which to base his opinion regarding Hensley's "work pattern" as a bus driver, or his opinion regarding the "constant frictional pattern" to which Hensley was subjected on his particularly rough bus route during July and August of 1977. . . . [His] opinion on the issue of aggravation is [thus] not entitled to the "substantial" weight which it must have to overcome the Congressionally mandated presumption.

Maj. Op. at 11, 13–14. This is a gross distortion of the factual testimony.

The record reflects that Dr. Stolar was qualified in the record as one of the nation's experts in dermatology. He had over 40 years experience in an extensive active practice and his qualifications were never challenged by Hensley. Let us look at "a little of [Dr. Stolar's] medical background", as reflected in the record, to determine if my

colleagues are correct in their statement that Dr. Stolar did not have "any particular experience or knowledge" upon which to base his opinion.

> [He] graduated from Georgetown University [and its] Medical School . . .:t, [interned] at Gallagher Municipal Hospital, a fellowship at Georgetown for two years; and then . . . two years . . . at New York University in Bellvue Hospital in New York. Then five years after that [he] was *Chief* of Dermatology Section for the United States Army, establishing a pilot program [turning out "specialists"] for them, and providing training for a small number of the 60,000 physicians who came on active duty. . . . [He then was] consultant to the V.A. Hospital, consultant to Walter Reed, the Army; and subsequently the Navy, and subsequently became the *national* consultant for the Air Force. [He now is] clinical professor of medicine at Georgetown, and professor of dermatology at Howard; [he] maintain[s] a rotation service in the office for residents and students who come in for observation and training; and [has] a routine of going to the several hospitals . . . Navy, Walter Reed—as part of a teaching program that they have established in those institutions.
>
> [He] carried on a similar program at Georgetown and at Howard [and is] interested in a number of dermatological problems, some of which are esoteric, and [has] published material on them.
>
> * * *
>
> MRS. ENDRESS [Hensley's lawyer]: *No questions.*

(App. 64–65) (Emphasis added).

II.

This case, which involves a question of medical fact, turns on whether the testimony of this national expert in dermatology (Dr. Stolar), who is "Board-certified in that

specialty" (App. 64), *and other testimony of record*, constitutes "substantial evidence." The ALJ observed "Dr. Stolar is an impressively credentialled member of a learned profession." (App. 84). Dr. Stolar gave his opinion after reading Dr. Nigra's medical reports (App. 79), letters from Drs. Mitchell and Nigra (App. 65), and after personally interviewing Hensley as to his medical history and then subjecting him to a physical examination. (App. 65, 157–160). The colored pictures of Hensley's affliction that Dr. Stolar had taken are an appendix to the WMATA brief.

It is the testimony (opinion, and uncontroverted and admitted factual statements) of this accredited national medical expert in dermatology, and substantial additional circumstantial evidence, that my colleagues recklessly condemn as not "substantial" and consign to oblivion. In lieu of Dr. Stolar's testimony, and the additional circumstantial evidence, they rely completely on the opinion of the very dermatologist who had been treating Hensley for many years when his psoriasis flared up and choose to ignore that portion of the dermatologist's testimony that is fatal to his patient's claim. If any doctor's testimony should be questioned it should be that of Hensley's regular dermatologist, who had substantially less experience than had Dr. Stolar and who, because he had been treating Hensley for psoriasis for years, had a definite self-interest in attributing Hensley's psoriatic flare-up to some cause other than his own treatment. Dr. Stolar testified that he probably would have stopped Hensley from working long before and tried to clear up his skin. (App. 83, 89).

Hensley's doctor (Mitchell) was not a novice in dermatology but his medical credentials were definitely inferior to those of Dr. Stolar. He was Board certified in 1963, had been licensed to practice for about 14 years. Recently he had been "employed by Group Health" as a dermatologist. (App. 23). He was in private practice only from 1964 to 1967 and for a "short time after he came to Washington." He was on the staff at Doctor's Hospital and Georgetown University. As to publications, "only one."

Relying on his own analysis, Dr. Mitchell claimed the Koebner phenomenon supported his contention that Hensley's psoriatic condition was *aggravated* by his occupation as a bus driver.[2] The aggravation claimed was the development of *psoriatic lesions* during the time he was driving his bus over some bumpy pavement (App. 28, 30, 32, 48). However, Dr. Stolar's testimony and reports indicate that in his expert opinion the Koebner phenomenon did *not* support the contention that the psoriatic lesions constituting the alleged aggravation were caused by Hensley's driving his bus over the bumpy pavement (App. 73, 157–158, 159–160). In determining work relatedness all doctors, of necessity, relied upon their interviews with Hensley, but my colleagues determine that the testimony of the WMATA doctor because of such reliance is not substantial. Maj op. at 13–14. There is no justification for refusing to accept Hensley's factual statements as reported to Dr. Stolar and accepting them when given to his own doctor. There is no testimony that either doctor was with him when he was driving the bus. If Dr. Stolar could not give an opinion on the basis of the patient's statements, neither could Hensley's doctors.

On the controlling issue the Administrative Law Judge in his Findings of Fact and Conclusions of Law stated:

> The sole issue is one of medical fact, specifically, whether Mr. Hensley's holding the steering wheel of a bus, being bounced in the seat and using his feet in driving has aggravated his underlying non-job related condition. I believe that the weight of substantial evidence preponderates on the side of non-exacerbation. Thus, the treating physician testified that Koebner's phenomenon is produced only by injuries that penetrate the epi-

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[2] Another doctor (Nigra) who treated Hensley subsequently opined that his occupation "could result in trauma and therefore flaring of his basic [psoriatic] condition." (App. 154).

> dermis and injure the dermis but that "it's well established that the mild, repeated trauma to the knees and elbows of patients accounts for the characteristic distribution of psoriasis, and this is a form of Koebner's phenomenon." Aside from the internal inconsistency of this testimony, photographs submitted in evidence with his report show that, while Hensley's elbows have extensive psoriatic lesions, his knees are clear and uninvolved despite the fact that his work is largely performed in a seated position and at least one leg, according to Hensley, "does all the work." Ironically, this physician's patient's condition is significantly inconsistent with the premise upon which the entire theory of causation is based.
>
> While I am mindful of the presumptions of section 20 of the Act, the provisions of that section mandate that these presumptions cannot supply causation where other substantial evidence indicates that it is non-existent. *Cf., Callbeck v. Strachan Shipping Company*, 306 F.2d 693, 694, 696 (5th Cir. 1962). Accordingly, the claim will be denied.

(App. 19).

The Administrative Appeals Judges, one judge dissenting,[3] after reviewing the record and the ALJ decision, reached the same conclusion:

> The record as summarized above contains substantial evidence to support the administrative law judge's conclusion. Dr. Stolar stated clearly on several occasions that he was of the opinion that claimant's condition was not work-aggravated. Although the other physicians expressed opinions to the contrary, the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it and is not

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[3]The dissent was sketchy, generalized and largely conclusory.

bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Dr. Stolar's opinion that claimant's psoriasis was not work-aggravated together with the record evidence that *areas not subject to trauma were also involved and that the problem has continued despite the fact that claimant has been removed from the continual pounding constitutes substantial evidence to support the administrative law judge's ultimate conclusion.*[8] [Emphasis added].

Accordingly, the Decision and Order of the administrative law judge is affirmed.

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[8]We acknowledge that the administrative law judge's analysis is not a model of clarity. Also, his stressing of the fact that claimant's knees were not affected by psoriasis is puzzling in light of the fact that claimant's knees did not appear to be subject to repeated trauma. However, we do not believe these factors so undermine the administrative law judge's ultimate finding so as to require reversal.

(App. 11–12) (Emphasis added).

These decisions by agency officials specially trained in these workmen's compensation matters under the Longshoremen's Act clearly refute my colleagues' claim that Dr. Stolar's testimony and the other supporting evidentiary facts do not constitute "substantial evidence."

III.

The evidentiary record contains several basic facts that the Board and the ALJ relied upon in their opinions which in my view support their conclusion that the aggravation in Hensley's psoriatic condition was *not* work related, i.e.,

(1) Hensley began as a bus driver in 1946 and he had been driving continuously for 32 years.

(2) He contracted psoriasis in 1967 and it is admitted that this was *not* the result of any work related cause. (App. 2).

(3) "[Hensley] had dental surgery in the summer of 1977, *and following that* his psoriasis flared badly." (App 154, Letter of Hensley's Dr. Nigra) (Emphasis added). This is the approximate time when he claimed his work caused the aggravating flare-up.

(4) Other pre-existing causes that are recognized to cause such aggravation as Hensley suffered were present and were *not* work related. They include: (a) obesity, (b) severe emotional distress, and (c) burns of the skin (Cf., App. 156). Hensley had all of these causes. He was "constantly told that his obesity is an aggravating factor in his psoriasis." (App. 52). He had suffered extreme emotional distress in 1975 when his son attempted suicide and wound up being "mentally incapacitated and back at home." (App. 45–46).[4] He had also suffered some skin burns from the ultraviolet

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[4]Claimant did not contend his emotional distress was work related (App. 6). *Hensley's treating doctor* testified:

> Mr. Hensley has had a lot of emotional upsets. I believe he had a son who tried to kill himself, and did an inadequate job and wound up being "mentally incapacitated" and back at home. This was extremely upsetting to Mr. Hensley.
>
> *And I can tell you, Mr. Hensley does flare with emotional stress. I couldn't say that his condition in 1977 was related to anything other than maybe this is an on-going stress in his life,* because this, as I recall, happened in 1975, I believe."
>
> [Hensley's medical record in Dr. Turner's handwriting for January 10, 1975 states:]
>
> "Series of catastrophes hit his family." I have trouble reading Dr. Turner's handwriting, too. Looks like: ". . . initiating last spring and he's starting to flare up again. He has a few small marks on the elbows, his scalp is totally involved, as is his buttocks and intergluteal and inguinal areas are most severely involved."

(App. 46) (Emphasis added).

treatment he was receiving from the doctor for his psoriasis. (App. 41, 68, 159).

(5) Hensley's Group Health medical records show that he had "Lesions of psoriasis in scalp, both elbows and groin area" as far back as *July 15, 1970.* (App. 162). This same *1970 entry* stated: "Non-psoriatic macular papular lesions—*Koebner's phenomena and in groin area.*" (App. 162). Thus, his lesions were of longstanding duration and the Koebner phenomenon was claimed to be causing aggravation for reasons that were not claimed to be work related as far back as 1970. His situation was much the same in 1978. He had lesions on his hands and the soles of his feet, which he attributed to work-related physical trauma. *The claim with respect to his feet, however, was subsequently attributed to another cause by his doctor.* But he also had lesions in other areas of his body *where no trauma was claimed to exist.* His scalp was "heavily crusted all over," and he had lesions on the groins, perineum, upper inner thighs, knees, elbows, center of the back, and buttocks. Dr. Stolar stated that he "looked for evidence of Koebner phenomenon, but did not find any. The varying lesions appear to be spontaneous and well established." (App. 158).

(6) On August 15, 1977, after years of medical treatment which controlled his psoriatic condition reasonably well, it again became aggravated over his whole body. Ignoring the other aggravating lesions Hensley contended that the contemporaneous aggravation of his palms and soles was caused by the recent "pounding" which resulted from driving his bus over the new (bumpy) route. He had selected this new bus route in the fall of 1976 (App. 3).

(7) Hensley's doctors in 1977 contended that the Koebner phenomenon supported their claim that his aggravated condition was work related. The doctors had also attributed his 1970 flare-up to the Koebner phenomenon but had never contended that the aggravation at that time was worked related. As to the 1977 claim (the present claim) the Board ruled against Hensley and pointed out that his *aggravation*

(lesions) was present in areas not subject to the alleged physical work-related trauma that he contended were the cause of the aggravation. His right ankle[5] and stomach and other areas that were not involved in any of the alleged trauma also had the same lesions[6] (App. 6) and his condition remained severe three months after he quit driving a bus (App. 6). The existence of such lesions in areas that could *not* be considered to have been affected by the alleged work related cause (trauma) is extremely significant because Hensley's own doctor testified that "trauma to an area of skin in a patient who has psoriasis will result in a flare of psoriasis *in the traumatic area.*" (App. 4, 14) (Emphasis added). *Thus, the existence of the numerous psoriatic lesions in areas admittedly not affected by the alleged trauma was fatal to the probative effect of the testimonial claims and theory of Hensley's doctors.* And see (8) *infra.*

(8) Hensley's doctor (Mitchell) admitted that the psoriatic lesions on the soles of the feet of his bus driving patient were caused by "his walking":

> I think *his* [Hensley's] *walking was aggravating his feet.* I think Mr. Hensley was a psoriatic who we describe as very brittle. And a lot of things would set him off. And I think this was one of the contributing factors to his getting worse.

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[5] Hensley's doctor testified he could not "relate" the psoriatic eruption on his right ankle to his use of his "right foot to brake and to use the gas pedal." (App. 57).

[6] There was no work related scratching, cutting or bumping of his belly, chest, elbows or backside, but all these areas had psoriatic lesions (App. 42–43). My colleagues refer to pustular lesions on his hands and feet but it was the lesions, not their pustular nature, that caused the bleeding. Hensley never disputes the argument that the lesions elsewhere on his body belie his claim that his work caused the lesions on his hands and feet. (Cf. App. 6).

(App. 53) (Emphasis added). There is no testimony in the record that such "walking" was related to his occupation as a bus driver. Thus, here again the testimony of Hensley's own doctor is fatal to his claim, i.e., the pustular lesions on his feet were caused by a non-work related reason. And see (9) *infra*.

(9) This leaves only the issue of the application of the Koebner phenomenon to Hensley's *hands*. It has already been noted, with respect to his hands, that the *sine qua non* for work-related causation—some work related force that causes a penetration of the outer skin and injures the inner skin—is absent here. Part II *supra*. Also, since his hands were affected in *exactly* the same manner as his feet, and the aggravation of his feet was not work related, the Board's decision that the entire aggravation was not work related is amply supported by substantial evidence and logic. This conclusion is even stronger when it is recognized that lesions also occurred over the rest of his body and *none* of the other areas was affected by a work related cause.

IV.

From all the medical history and facts Dr. Stolar concluded that Hensley's condition "was [not] work related or work aggravated." (App. 160). The ALJ and the Board credited his testimony and opinion. My colleagues say such record testimony does *not* constitute substantial evidence and they reverse the judgment based thereon because, allegedly absent substantial evidence, the "Board failed properly to apply the statutory presumption [of coverage] concerning work-relatedness in this case." Maj. op. at 19. In reality this is a blatant attempt to reweigh the evidence in violation of the Supreme Court's ruling in *Del Vecchio v. Bowers*, *supra*. If Dr. Stolar's testimony does not constitute "substantial evidence" then substantial evidence does not exist. To characterize his testimony, and the very strong circumstantial evidence, as "insubstantial" is to transmogrify the record.

All this leads to my colleagues misapplying the statutory procedural presumption of coverage in § 920(a). They give lip service to the proper rule but end up treating the presumption as substantive rather than procedural by applying it to resolve disputed factual issues.[7] *Del Vecchio v. Bowers*, 296 U.S. 280 (1936) is the definitive case on this point. It dealt with the § 920(d) presumption against suicide which has the same status as the presumption of coverage that is involved here:

> The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. [ ] *Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor.* [ ] *Its only office is to control the result where there is an entire lack of competent evidence.* If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con; [ ] and *if it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court.*

296 U.S. at 286-87 (Footnotes omitted).

Del Vecchio thus limits presumptions under § 920 to their procedural effect and prohibits such presumption from having any substantive or evidentiary effect. The Board prop-

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[7]The dissent to the decision by the Benefits Review Board makes the same error (App. 14).

erly found that the presumption of § 920(a) had been rebutted and that there was substantial evidence on the record considered as a whole to support its finding that the cause of Hensley's aggravation was *not* work related.

When my colleagues treat the presumption as substantive rather than as procedural they commit error in so doing. The ALJ and the Board had extensive circumstantial evidence from all the doctors that completely belies Hensley's work-related theory. See n.4, *supra*, for testimony of Hensley's doctor. In addition, they had a choice between the expert testimony of a national medical expert and the opinion of a doctor of lesser stature and experience whose personal treatment of the patient as a potential cause of his aggravation was directly involved. They elected to credit Dr. Stolar's opinion, and the surrounding factual circumstances, amply established in the record, also supported their decision. The claim that the psoriatic lesions on Hensley's hands and feet were *caused* by the bouncing of his bus on the road, and that these lesions were examples of Koebner's phenomenon, was refuted by the fact that he had similar lesions on other areas of his body which were not subject to the work related cause he contended brought about the aggravated condition of his feet and hands. My colleagues wholly ignore the circumstantial evidence, including the fatally adverse testimony of Hensley's doctor (n.4 *supra*) and apply the discredited claim that "normally . . . greater weight" goes to two physicians rather than one. Maj op. at 17 n.13.[8] There is no such rule. The

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[8]My colleagues completely dismiss Dr. Stolar's opinion because he had no "particular experience or knowledge" of Hensley's driving conditions. Maj. op. at 13. Yet the majority is prepared to give "greater weight" to the testimony of Hensley's two treating physicians, whose experience and knowledge in this respect were no greater. In fact all doctors obtained their knowledge of Hensley's driving conditions from their interviews with Hensley.

greater weight should be given to the more creditable testimony, all factors considered. And the *weight* of the evidence is primarily to be determined by the ALJ and the Board.

The decisions of the Supreme Court require that the Administrative Law Judge and the Benefits Review Board be affirmed.

> "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. *The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.* . . . Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. . . ." *Cardillo v. Liberty Mutual Ins. Co.*, [330 U.S. 469, 478.]
>
> The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or "unsupported by substantial evidence on the record . . . as a whole." *O'Leary v. Brown-Pacific-Maxon, Inc.*, [340 U.S. 504,] 508 (1951).

O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 361-62 (1965). *Banks v. Chicago Grain Trimmers, supra*, 390 U.S. at 467, also held that where

> some of the testimony of the petitioner's medical expert was arguably inconsistent with other parts of his testimony, it was within the province of the Deputy Commissioner to credit part of the witness' testimony without accepting it all.

390 U.S. at 467.

V.

The heavy reliance that my colleagues place on our decision in *Wheatley v. Adler*, 407 F.2d 307, 313-14 (D.C. Cir. 1968), (Maj. op. at 3, 5, 6) is misplaced so far as this case is concerned or as to any case where there was medical testimony that the injury was *not* work related. In *Wheatley* the doctor for the defendant "was *unable* to state an opinion on the key question, whether there was a work related factor that aggravated the employee's condition." 407 F.2d at 313 (Emphasis added). Thus, the decision in *Wheatley* is not relevant here where the doctor did testify as to his opinion. This likewise is not a case like *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306 (D.C. Cir. 1979) where the case was remanded to determine if claimant was married to the deceased because the contrary determination was not based upon the "applicable state law of domestic relations as required by [the applicable Supreme Court opinion]." 601 F.2d at 1315. Nor can WMATA's case against Hensley's claim by any stretch of the imagination be construed to involve "isolated evidence." *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955), *cited in* Maj. op. at 4, 6.

Another substantial error lies in the persistence with which my colleagues ignore both circumstantial evidence and adverse medical testimony in stating that Dr. Stolar's testimony is the only contrary evidence. See *supra* at pp. 2-3, n.4; pp. 12–13, paragraph (8); and Part III, *passim*.

My colleagues have clearly exceeded their judicial authority. If the pattern they follow here were proper, all testimony of employer physicians who examined the worker *after* he made his claim could be arbitrarily ignored as "not entitled to 'substantial' weight" (Maj. op. at 13), and *every* contested claim could be determined by the presumption of coverage and a sympathetic desire to bring about "beneficent purposes and humanitarian" objectives. (Maj. op. at 5).

Conclusion

In sum the majority opinion is unrealiable because—

(1) it exceeds its authority under the Longshoreman's and Harbor Workers' Compensation Act by refusing to give proper recognition and weight to the findings, conclusions and decisions of the Administrative Law Judge and the Benefits Review Board;

(2) it fails, for improper reasons, to give *any* consideration to the highly relevant expert testimony of Dr. Stolar;

(3) it relies upon non-existent testimony to support its "blister theory";

(4) it ignores the adverse testimony of Hensley and his own doctors that aggravation was caused by non-work related causes;

(5) it ignores the likelihood that Hensley's non-work related prosiasis was aggravated by other active and recognized non-work related causes such as obesity, severe emotional distress, and an earlier instance of aggravation of his psoriasis by operation of the Koebner phenomenon from non-work related causes.

APPENDIX B

Decision of the Benefits Review Board, Department of Labor

APPENDIX B

Decision Of The Benefits Review Board, Department Of Labor

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

BRB No. 78-637

WILLIAM DAVID HENSLEY *Claimant-Petitioner*

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *Self-Insured Employer-Respondent*

Decision And Order

(Filed October 31, 1979)

Appeal from the Decision and Order of Peter McCann Giesey, Administrative Law Judge, United States Department of Labor.

Carolyn McKenney Endress (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Richard W. Turner (Hamilton and Hamilton), Washington, D.C., for the employer.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by claimant from the Decision and Order (78-DCWC-275) of Administrative Law Judge Peter McCann Giesey pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the District of Columbia's Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (hereinafter, the Act).

Claimant, a bus driver, has been employed by Washington Metropolitan Area Transit Authority (WMATA), and its predecessor, D.C. Transit Authority since 1947. In 1967 he contracted a non-job-related dermatosis psoriasis, a condition effectively controlled by medication until August of 1977. His condition worsened dramatically at that time, forcing him to cease work on August 15, 1977. He returned to work on August 23, but continued discomfort forced him to cease his employment indefinitely September 5, 1977. The administrative law judge determined his average weekly wage as of that date to be $379.40.

Claimant subsequently filed a claim for temporary total disability compensation under Section 8(b) of the Act, alleging that physical "pounding" associated with his employment aggravated his psoriasis. In particular, he contended that the unusually rough ride caused by construction on parts of his then newly-acquired route, coupled with his bus's poor suspension, steering, and design, had so aggravated his condition as to make his continued employment as a bus driver impossible.

Following a formal hearing held in Washington, D.C. on August 4, 1978, the administrative law judge issued a Decision and Order denying Hensley's claim. Specifically, he concluded, after examination of the record as a whole, that the weight of substantial evidence led to the conclusion that claimant's employment was not the agent aggravating his psoriasis. Claimant now appeals, contending that the Decision is not supported by substantial evidence in the record considered as a whole, is irrational, and is not in accordance with law.[1]

The evidence in the record relevant to the causation issue can be summarized as follows.

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[1] WMATA did not file a brief in response to claimaint's appeal. The Director, OWCP, informed the Board that since this appeal does not involve the administration of the Act, he would not intervene unless requested to do so by the Board.

At the formal hearing held on August 4, 1978, claimant testified that he had worked for WMATA and its predecessors for 32 years, and that until August of 1977, he had never missed work due to his psoriasis. He reported that the poor condition of the roads on his newly assigned route,[2] coupled with the poorly designed equipment usually assigned to that route,[3] made for a rough ride. "It just shook the heck out of your hands. It could even break your arm almost." Hearing Transcript (hereinafter HT), at 47. His psoriasis flared up soon after he acquired the route, and on the advice of Dr. Mitchell, his treating physician, he stopped driving on August 15, 1977. He tried driving on a trial basis two weeks later, but a relapse of his condition forced him to stop indefinitely on September 6, 1977. At the time of the hearing, WMATA had offered claimant a position involving lighter work which he hoped to take.

Dr. Thomas P. Nigra, chairman of the dermatology section of the Washington Hospital Center, as well as the physician supervising claimant's PUVA treatments,[4] noted in a November 3, 1977, letter to claimant's attorney:

> Psoriasis is a capricious disease which waxes and wanes and comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the traumatic area. It is my opinion that using his hands in his work the way Mr. Hensley does as a bus driver could result in trauma and therefore flaring of his basic condition.

[2] Claimant "picked" the C-4 route in the fall of 1976. A severe winter, together with construction in the area, left the road riddled with, often times, unavoidable potholes.

[3] In particular, the model of bus generally assigned to this route was known for its poor suspension, bad steering radius, and uncomfortable seat.

[4] A PUVA treatment is a two step process whereby the patient is first given a photo-sensitizing drug, and then exposed to a high-intensity ultraviolet light, in an attempt to clear up psoriatic lesions.

Claimant's Exhibit 1.

Dr. Donald A. Mitchell, claimant's treating physician since 1970, testified as to claimant's condition in a deposition taken on August 8, 1978.[5] He concurred with the general opinion that psoriasis is a disease of unknown cause, but opined that certain factors were recognized as ones that could aggravate or precipitate the condition. Among these, he stated, are a cut in the skin penetrating the epidermis to the dermis, emotional stress, weather, and local trauma to an area of skin, such as hitting an area on a repeated basis. Dr. Mitchell reported that while claimant had responded favorably to conventional treatment in 1970, he returned in August of 1977 suffering from a more severe case. "His psoriasis was what we call a guttate type of psoriasis, drop-like, all over the body. And he had extensive pustular lesions on the palms and soles." Deposition at 11. In response to questioning by claimant's attorney, Dr. Mitchell reported:

> Q: Doctor, do you have an opinion that you can state with reasonable degree of certainty as to whether or not Mr. Hensley's work as a bus driver aggravated his underlying condition of psoriasis?
>
> A: Let me preface my statement by saying, I don't think Mr. Hensley's psoriasis is due to his driving a bus, but I certainly think that the Koebner's phenomenon plays a part in this, and that this is service-aggravated, as we used to call it in the Army.
>
> Q: So his work did not cause the psoriasis, but it certainly did aggravate the condition?
>
> A: Oh, yes.

Deposition at 12, 13. Further, Dr. Mitchell agreed with Dr. Nigra's conclusions on the issue of psoriasis aggravation, as reported above.

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[5] A Board-certified dermatologist since 1963, Dr. Mitchell is a member of the Group Health Association, and of the staff at Doctors' Hospital and Georgetown University Hospital.

Dr. Mitchell later responded to the conclusion of employer's physician, Dr. Stolar, that claimant's psoriasis was not work-aggravated:

> Well, I disagree with Dr. Stolar on that point. It's well-established that the mild, repeated trauma to the knees and elbows of patients accounts for the characteristic distribution of psoriasis, and this is a form of the Koebner's phenomenon. He's quite right that the simple rubbing of the skin is not sufficient to do it. The article he refers to, removing the outer scale of the psoriasis, is an old treatment for psoriasis and nothing really new. And this is done so that the medication that is subsequently applied will penetrate. Because if it's applied on top of this micaceous scale, it doesn't get down to the psoriatic lesions. So this is an adjunct of therapy. Commonly, in the treatment with the Geoeckerman regimen, you have the patient apply it with a soft toothbrush, which is also a rubbing phenomenon. Dr. Stolar's report doesn't alter my opinion that this man's psoriasis is job-aggravated. That's about all I can say about it.

Deposition at 16, 17. Dr. Mitchell noted that he continued to treat claimant through January of 1978, at which time the claimant was referred to Dr. Nigra for PUVA treatments because conventional treatments were ineffective.

On cross-examination by employer's counsel, however, Dr. Mitchell made several concessions: First, that claimant possessed several of the speculated aggravating factors at the time of the flare-up, e.g. obesity, severe emotional distress,[6]

[6] There is no indication in the record that claimant alleged that his emotional distress was work-related in the proceeding before the administrative law judge. Counsel for claimant did not make an opening or closing statement at the hearing and did not file a brief with the administrative law judge setting forth claimant's theory of the case. Nor does Counsel for claimant raise this issue in his Petition for Review and brief. The Board has consistently held that issues cannot be appealed to the Board, if they were not first presented to the administrative law judge. *Moore* v. *Paycor, Inc.*, _____ BRBS _____, BRB No. 78-368 (April 30, 1979).

and a burn from the treatments he had been undergoing; second, claimant exhibited lesions in areas *not* subject to physical trauma, such as his ankle and stomach; and finally, that claimant's condition remained severe as of November 30, 1977, although he hadn't driven a bus since August of that year.

On re-examination by claimant's counsel, the following exchange took place:

> Q:All right. And in regard to the plaque on his right ankle, Mr. Hensley has testified that he uses his right foot to brake and to use the gas pedal, and does not use his left foot at all. Would this be consistent with the psoriatic eruption on that ankle?
>
> A: I couldn't relate it to the ankle, no. . . . The ankle wouldn't get it unless he's banging the ankle up against something when he's doing it.

Deposition, at 38.

Dr. Stolar, the physician who examined claimant at WMATA's request, also testified at the formal hearing.[7] He agreed with the view that psoriasis is a disease of unknown cause, but disagreed with the opinion that claimant's employment could be the aggravating cause of his particular case. His actual opinion on this issue, however, is not crystal clear. He reported as follows, in response to questioning by Judge Giesey:

> Q: That's not how I understand that testimony, and I don't want the record to be confused. The testimony I understand the Doctor gave was that he does not know the cause of psoriasis, and that it was general; is that correct sir?
>
> A: Correct, sir.

---

[7] Dr. Stolar, a Board-certified specialist in dermatology, currently is Professor of Dermatology at Howard University, as well as a Clinical Professor of Medicine at Georgetown University.

Q: There is a far cry between not knowing a cause and being able to rule out something as a cause. Let's get the record straight: Can you rule out occupation as a cause, or contributing agent in psoriasis?

A: There are no supportive records in the literature that any specific occupation or specific activity produces psoriasis. There are no such available.

Q: As a scientist, is that the same as saying they do not exist?

A: No, no. The cause is unknown. That is all. But they do exist. I've brought along two major textbooks that state, starting out their discussion, "The cause is unknown." I thought I would after reviewing at least eight or ten different texts in the literature subsequent to Mr. Turner's request — none would venture a cause or causal relationship with any activity that anyone had.

HT at 11, 12. But then, in response to questioning by employer's counsel, Dr. Stolar reported:

Q: Doctor, then, let me ask my question in a slightly different way: You say there are no known causes; can you with reasonable medical certainty say that the occupation of Mr. Hensley did or did not cause?

A: In my experience the pattern of work that he carried on does not produce psoriatic lesions by the only known traumatic mechanism which I mentioned for the Koebner phenomena, which would require a different type of injury than what I could visualize that he received at any time.

HT at 13. He later went on to explain that the smoothing or sliding frictional pattern associated with Mr. Hensley's work was actually part of the treatment for psoriasis.

On cross-examination by claimant's counsel, Dr. Stolar reported that there were factors thought to precipitate or worsen the psoriatic condition. He included among these, emotional stress, and even the conventional methotrexate

treatment given to those suffering from psoriasis. He agreed with Dr. Nigra's opinion that psoriasis is a capricious disease, waxing and waning, coming and going without cause, but disagreed with Dr. Nigra's opinion that trauma to an area of skin of a patient suffering from psoriasis will result in a flare of psoriasis in that area. He noted that claimant had been working as a bus driver for 15 or 20 years with his psoriasis and had not suffered such a flare-up at any time during that period.

In response to later questioning by employer's counsel however, Dr. Stolar reported:

> Q: You were asked about trauma as a precipitating factor; is that not what you told us about this Koebner phenomenon, the trauma, the cutting of the skin?
>
> A: Yes.
>
> Q: But other than that, you know of nothing?
>
> A: The friction or the abrasive pattern does not appear to do it; right.

HT at 26. Dr. Stolar also reported that there is literature in support of the proposition that stress could be a factor aggravating psoriasis, and that he agrees with that opinion. He even cited an example where a young lady suffering from severe emotional stress experienced severe psoriatic lesions for a brief period of time, but they disappeared when the cause of the stress was removed. However, his final conclusion, was that claimant's employment was not the aggravating agent in this case. Moreover, in a letter to employer's counsel, dated May 24, 1978, he concluded:

> As you will note from the extract from my medical record, Mr. Hensley has heavy psoriatic lesions on the scalp. He has them transversely across the abdomen where he says he was burnt by the ultra violet lamp and he did not have the lesions there until he was so burnt while under treatment. Now such a burn may produce a so called Koebner phenomenon, but it has to be rather

severe and this is possible as has been demonstrated by severe burning in other patients in the past. Koebner phenomenon is a mechanism whereby a psoriatic lesion will occur following a severe traumatic injury usually of enough intensity to produce a change in the dermis or subcutaneous tissues whereby the blood vessel pattern is altered, stimulated, and a response may occur with a psoriatic lesion. This may occur with a deep scratch or severe burning. I have never seen it from a routine frictional pattern on the surface. There are experimental evidences which indicate that frictional patterns to remove the scale repeatedly applied does not produce but may actually improve the psoriatic lesion. An experimental use of a polyester fiber sponge as an adjunct to the treatment of psoriasis was carried out by Dr. William V. R. Shellow as reported in the March, 1978, issue of *Cutis,* a dermatologic journal. The rough fiber sponge was used to remove the scaling and there was improvement of the psoriasis. This has been carried through by many routines of treatment. I could not visualize how his shoes would create a frictional pattern of enough intensity to produce a psoriatic response on his soles as was indicated by Dr. Mitchell. He uses both hands in his work and there is a frictional pattern on the right palm, but it apparently was not of enough severity to create an extensive psoriatic eruption over the whole palm and palmar surfaces of the fingers.

As to the relationship of the dental work done on Mr. Hensley by Dr. Harry E. Ferris, I could not relate anything that was done to him in that respect having any effect on his psoriasis. Psoriasis has so many spontaneous increases and decreases, and lesions, and extent that it is impossible to determine that any one pattern of injury may definitely be the responsible agent for its manifestations.

I agree with Dr. Thomas P. Nigra's statement "psoriasis is a capricious disease which waxes and wanes and

comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in a traumatic area." However, that trauma must be sharp and intensive enough to establish a response and almost always that response is linear.

There is no question that Mr. William D. Hensley has an unfortunate and to a great extent disabling condition of psoriasis; however, in attempting to evaluate it from his history and examination, I was unable to determine that it was work related or work aggravated.

Employer's Exhibit 8.

The record as summarized above contains substantial evidence to support the administrative law judge's conclusion. Dr. Stolar stated clearly on several occasions that he was of the opinion that claimant's condition was not work-aggravated. Although the other physicians expressed opinions to the contrary, the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741 (5th Cir. 1962). Dr. Stolar's opinion that claimant's psoriasis was not work-aggravated together with the record evidence that areas not subject to trauma were also involved and that the problem has continued despite the fact that claimant has been removed from the continual pounding constitutes substantial evidence to support the administrative law judge's ultimate conclusion.[8]

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[8] We acknowledge that the administrative law judge's analysis is not a model of clarity. Also, his stressing of the fact that claimant's knees were not affected by psoriasis is puzzling in light of the fact that claimant's knees did not appear to be subject to repeated trauma. However, we do not believe these factors so undermine the administrative law judge's ultimate finding so as to require reversal.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

So Ordered.

/s/ Samuel J. Smith
Samuel J. Smith
Chief Administrative Appeals Judge

I concur: Ismene M. Kalaris
Ismene M. Kalaris
Administrative Appeals Judge

Miller, Administrative Appeals Judge, dissenting:

Although the majority concedes at footnote 8, page 11, "that the administrative law judge's analysis is not a model of clarity", they nonetheless affirm the denial of benefits in this case. In another recent case, *Tino* v. *Navy Exchange,* BRBS, BRB No. 78-623 (Aug. 31, 1979), I found myself obligated to point out the distressing disparity between the majority's affirming of inherently defective decisions which deny benefits on the one hand while remanding for clarification and elaboration those decisions awarding benefits which fall at all short of technical perfection.

In my view, the decision below in this case is not merely unclear; it is wrong. The administrative law judge construed the issue before him narrowly. At page 4 of his Decision and Order, he succintly stated his view of the case:

> The sole issue is one of medical fact, specifically, whether Mr. Hensley's holding the steering wheel of a bus, being bounced in the seat and using his feet in driving has aggravated his underlying non-job related condition. I believe that the weight of substantial evidence preponderates on the side of non-exacerbation.

The majority likewise treats the case as one limited to aggravation by physical trauma (banging, jolting and/or rubbing) and affirms the denial below as supported by substantial evidence.

However, the evidence of record — both the medical reports referred to by the majority and the claimant's testimony — provides a considerably broader fact pattern for our consideration. It is clear that the claimant's change of route assignment exposed him not merely to physical pounding, but also to generalized stress. It is likewise clear that the medical experts were in substantial agreement that "psoriasis is a capricious disease of unknown cause which waxes and wanes and comes and goes without cause." There is also medical evidence that stress, including emotional stress, can aggravate or precipitate the condition. This evidence was before the administrative law judge and it was his duty to consider all aspects of the case, not merely those stressed by counsel. Likewise, on appeal our statutory mandate requires a consideration of the record "as a whole." 33 U.S.C. §921(b)(3).

The fundamental issue in every case involving a claim for disability arising from employment is the same: is the claim compensable and, if so, to what extent? This Board has properly shown great solicitude for the proper conduct of hearings and the complete development and evaluation of all evidence favorable to the claim in cases involving *pro se* claimants. *See Laughlin* v. *Director,* 7 BRBS 644, BRB No. 77-181 BLA (Jan. 24, 1978). However, the duties of the administrative law judge and this Board are not lessened merely because claimant is assisted by counsel. The Act, its implementing regulations, the incorporated provisions of the Administrative Procedure Act and the interest of justice all combine to require a full evaluation of all aspects of the evidence and law supportive of the claim. This is particularly true in a case, such as this one, where the parties did not clearly define the issues to be considered at the hearing.

I regret that in affirming a denial of compensation, my colleagues overlook the basic requirement that the Act be construed to effectuate its humanitarian and beneficent purposes. In case of doubt, the doubt should be resolved for the claimant and against those best able to bear the burden of error.

The law is clear. "It is enough if something unexpectedly goes wrong within the human frame." *Commercial Casualty Insurance Co.* v. *Hoage,* 75 F.2d 677 (D.C. Cir. 1935), *cert. denied,* 295 U.S. 733 (1935). Gaps in medical knowledge are not to prejudice the claimant. Where the state of the medical arts are such that cause and effect can not be defined with certitude, the presumption of causal connection provided by Section 20 of the Act, 33 U.S.C. §920, requires that any doubts be resolved in favor of the claimant. *Wheatley* v. *Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Mitchell* v. *Woodworth,* 449 F.2d 1097 (D.C. Cir. 1971), *Urban Land Institute* v. *Garrell,* 346 F. Supp. 699 (D.D.C. 1972; and *Swinton* v. *J. Frank Kelly, Inc.,* 554 F.2d 1075, 4 BRBS 466 (D.C. 1976), *cert. denied,* 429 U.S. 820 (1976). On the medical evidence in this case, it is impossible to exclude the possibility of a causal nexus between's claimant's employment and the disabling flare up of his psoriasis which occurred coincidentally with the change in his work duties after the condition had been medically controlled for a decade. Accordingly, I would reverse the denial of the claim below and remand for a determination of the nature and extent of claimant's disability.

/s/ JULIUS MILLER
Julius Miller,
Administrative Appeals Judge

Dated this 31st day
of October 1979.

APPENDIX C

Decision and Order of the Administrative Law Judge

APPENDIX C

Decision And Order Of The Administrative Law Judge

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 78-DCWC-275
OWCP No. 40-119689

In the Matter of

WILLIAM DAVID HENSLEY *Claimant*

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY
Self-Insured Employer

CAROLYN MCKENNEY ENDRESS, ESQUIRE
Ashcraft, Gerel & Koonz
2101 L Street, N.W.
Washington, D.C. 20037
For the Claimant

RICHARD W. TURNER, ESQUIRE
600 Union Trust Building
Washington, D.C. 20005
For the Employer

Before: PETER MCC. GIESEY
Administrative Law Judge

Decision And Order

This is a claim for temporary total disability under the District of Columbia Compensation Act, D.C. Code 36-501, *et seq.* (hereafter, "the Act").

A hearing was held in Washington, D.C. on August 4, 1978.

Having considered the entire record including the testimony, exhibits[1] and statements of positions of the parties and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and decision and order based thereon.

Statement of the Case

Since 1967, Mr. Hensley has suffered with a dermatosis-psoriasis. This condition worsened, and on August 15, 1977, he was obliged to cease work. He resumed his employment on August 23, 1977, but was forced to cease work again on September 5, 1977 and has not worked since that time. His average weekly wage at the time that he ceased work was $379.40.

Briefly, Mr. Hensley testified that he has worked as a bus driver for WMTA and its predecessor for 32 years. Before August, 1977, he had never lost time from work because of his psoriasis. In the fall of 1976 he had "picked " (elected to drive a bus on) the C-4 route. During that winter the streets over which he drove were partially under repair or involved in the transport of heavy equipment used in the construction of new roads and, in consequence, were "just chopped all to pieces." He stated that the type of bus assigned his route had notably poor suspension, was equipped with a driver's seat of unsatisfactory (uncomfortable) design and had a steering ratio which required "at least twice as many turns" as other buses used by the Authority. He stated that because of the bus design and road conditions, various parts of his body were "banged", that he was "continually bouncing" and that driving "shook the heck out of your hands" — particularly the left hand used to steady the wheel.

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[1] The transcript of the deposition of Mr. Hensley's treating physician, submitted post-hearing is marked "Joint Exhibit 2" and entered in evidence on motion of the parties.

Mr. Hensley's treating physician was deposed. Briefly, he stated that when he first saw claimant in 1970, he had "fairly typical generalized psoriasis". During the years that followed, claimant's condition was treated with resulting "very good control" until 1977. This physician stated that the cause of psoriasis is unknown, it is a carpricious disease which may respond to weather, obesity, emotional stress and injury. Concerning the latter, he explained that a pin scratch will result in psoriatic lesions in the area. This is known as Koebner's phenomenon. He stated that while he did not believe that Mr. Hensley's psoriasis is caused by his driving a bus, he did believe "that the Koebner's phenomenon plays a part in [aggravation of the condition]", that while "simple rubbing of the skin" is not sufficient to cause Koebner's phenomenon, "mild, repeated trauma to the knees and elbows . . . accounts for the characteristic distribution of psoriasis and . . . is a form of Koebner's phenomenon."

Another physician who examined claimant at the behest of his counsel stated his opinon thus;

> Psoriasis is a carpricious disease that waxes and wanes and comes and goes without cause. However, we do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the traumat[ized] area. It is my opinion that using his hands in his work the way Mr. Hensley does as a bus driver could result in trauma and therefore flaring of his basic condition.

A physician who examined claimant at the behest of respondent testified to his disagreement with the treating and examining physicians concerning aggravation of Mr. Hensley's condition. He explained that the treating physician's opinion that "the patient will continue to have aggravation of his psoriasis as long as he continues his present occupation as a bus operator" ignores the fact that Hensley "has been working for 15 or 20 years with his psoriasis." He pointed out that the Koebner's phenomenon is produced only by an injury, such as cut, which penetrates the epidermis and reaches the

derma and stimulates the blood vessels therein. This physician stated further that rubbing, smoothing or abrasion such as encountered in Hensley's work is a part of the treatment for psoriasis, rather than a exacerbating influence.

Findings of Fact and Conclusions of Law

The facts are as stated above.

The sole issue is one of medical fact, specifically, whether Mr. Hensley's holding the steering wheel of a bus, being bounced in the seat and using his feet in driving has aggravated his underlying non-job related condition. I believe that the weight of substantial evidence preponderates on the side of non-exacerbation. Thus, the treating physician testified that Koebner's phenomenon is produced only by injuries that penetrate the epidermis and injure the dermis but that "it's well established that the mild, repeated trauma to the knees and elbows of patients accounts for the characteristic distribution of psoriasis, and this is a form of Koebner's phenomenon." Aside from the internal inconsistency of this testimony, photographs submitted in evidence with his report show that, while Hensley's elbows have extensive psoriatic lesions, his knees are clear and uninvolved — despite the fact that his work is largely performed in a seated position and at least one leg, according to Hensley, "does all the work." Ironically, this physician's patient's condition is significantly inconsistent with the premise upon which the entire theory of causation is based.

While I am mindful of the presumptions of section 20 of the Act, the provisions of that section mandate that these presumptions cannot supply causation where other substantial evidence indicates that it is non-existant. *CF., Callbeck* v. *Strachan Shipping Company,* 306 F.2d 693, 694, 696 (5th Cir. 1962). Accordingly, the claim will be denied.

ORDER

The compensation claim of William David Hensley is denied.

/s/ PETER McC. GIESEY
Peter McC. Giesey
Administrative Law Judge

Dated: November 29, 1978
Washington, D.C.

APPENDIX D

Excerpts from Trial Record

APPENDIX D

Excerpts From Trial Record

Thereupon,

DONALD A. MITCHELL, M.D.,

a witness herein, was called for examination by counsel for the Claimant, and, having been first duly sworn by the Notary, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE CLAIMANT:

BY MS. ENDRESS:

Q. Doctor, would you please state your full name and business address for the record?

A. Donald A. Mitchell, 2121 Pennsylvania Avenue, N.W., Washington, D.C.

Q. What is your profession, sir?

A. Dermatology.

Q. And are you licensed to practice medicine in any jurisdiction?

A. The District of Columbia, Maryland, Virginia, and North Carolina.

Q. And how long have you been licensed to practicemedicine in the District of Columbia?

A. Since 1964.

Q. Thank you, Doctor.

Doctor, could you tell us a little bit about your medical training?

A. I went to medical school at the University of North Carolina. I came to Washington, to G.W., and did an internship and a medical residency, and then did a residency in dermatology at Walter Reed.

I left Walter Reed and was the Asian Consultant in Dermatology for the Army.

Then I was the Dermatology Consultant for the Food and Drug Administration.

And I believe it was in — let me say it must have been '66, I came to Group Health.

Q. And are you presently employed by Group Health?

A. That's right.

Q. In what capacity?

A. As a Dermatologist.

Q. Are you the head of the Dermatology Department here?

A. No, I am not.

* * *

Q. Doctor, you have had occasion to treat Mr. William D. Hensley, Jr. in the present case, have you not?

A. That's right.

Q. Approximately how long have you been treating Mr. Hensley for his psoriasis?

A. I first saw Mr. Hensley, according to my records, in 1970.

* * *

A. In August of 1977, Mr. Hensley came in with more extensive psoriasis. His psoriasis was what we call a guttate type of psoriasis, drop-like, all over the body.

And he had extensive pustular lesions on the palms and soles.

Q. At the time you examined Mr. Hensley, did you take a history from him?

A. Yes.

Q. In taking your history, did you determine what Mr. Hensley's occupation was?

A. I have known what Mr. Hensley's occupation was for years.

Q. What is it?

A. He's a bus driver.

Q. Thank you, Doctor.

At the time you examined Mr. Hensley in August of 1977, was Mr. Hensley in some pain?

A. Oh, yes quite a lot of discomfort.

Q. And was his condition severe — moderate — mild?

A. Severe.

Q. Was the Claimant, in your opinion, disabled from his trade as a bus operator at that time?

A. Oh, yes, very definitely.

Q. Can you tell us why you felt he could not continue work as a bus driver?

A. He couldn't use his hands, and he couldn't use his feet, either, and, quite honestly, I wouldn't want him driving a bus with those hands and feet and having my life in jeopardy.

Q. Not only was he in pain, but he would have been endangering the lives of others?

A. Not only his passengers, but me, as a motorist on the road with him.

Q. Doctor, do you have an opinion that you can state with reasonable degree of certainty as to whether or not Mr. Hensley's work as a bus driver aggravated his underlying condition of psoriasis?

A. Let me preface by statement by saying, I don't think Mr. Hensley's psoriasis is due to his driving a bus, but I certainly think that the Koebner's phenomenom plays a part in this, and that this is service-aggravated, as we used to call it in the Army.

Q. So his work did not cause the psoriases, but it certainly did aggravate the condition?

A. Oh, yes.

* * *

Q. Doctor, have you reviewed Dr. Stolar's two medical reports?

A. Yes.

Q. Would you care to comment on those reports and on Dr. Stolar's conclusion that Mr. Hensley's psoriasis was not work-aggravated?

A. Well, I disagree with Dr. Stolar on that point. It's well-established that the mild, repeated trauma to the knees and elbows of patients accounts for the characteristic distribution of psoriasis, and this is a form of the Koebner's phenomenon.

He's quite right that the simple rubbing of the skin in not sufficient to do it. The article he refers to, removing the outer scale of the psoriasis, in an old treatment for psoriasis and nothing really new. And this is done so that the medication that is subsequently applied will penetrate. Because if it's applied on top of this micaceous scale, it doesn't get down to the psoriatic lesions.

So this is and adjunct of therapy.

Commonly, in the treatment with the Geoeckelman regimen, you have the patient apply it with a soft toothbrush, which is also a rubbing phenomenon.

Dr. Stolar's report doesn't alter my opinion that this man's psoriasis is job-aggravated. That's about all I can say about it.

* * *

EXAMINATION BY COUNSEL FOR THE EMPLOYER:

BY MR. TURNER:

* * *

Q. So that psoriasis is not limited to any one occupation, is it?

A. No.

Q. You don't consider it an occupational disease?

No. Definitely is not.

* * *

By Ms. Endress:

Q. All right, And in regard to the plaque on his right ankle, Mr. Hensley has testified that he uses his right foot to brake and to use the gas pedal, and does not use his left foot at all.

Would this be consistent with the psoriatic eruption on that ankle?

A. I couldn't relate it to the ankle, no.

* * *

DR. ROBERT STOLAR

was called as a witness for respondent and, having been first duly sworn by the Judge, was examined and testified as follows: Direct Examination

By Mr. Turner:

* * *

Q. Dr. Stolar, if you will speak so that the Judge and Mrs. Endress and I may all hear your testimony, we would appreciate it.

Please state your full name and your office address?

A. Robert Stolar S T O L A R, 1145 Nineteenth Street, Northwest.

Q. Doctor, are you a licensed physician in the District of Columbia?

A. I am.

Q. And how long have you been a licensed physician, Doctor?

A. Since 1937.

Q. And, Doctor, do you have a specialty?

A. Dermatology is my specialty.

Q. You are Board-certified in that specialty?

A. I am.

Q. Doctor, would you give us a little of your medical background, such as, when and where you graduated from medical school, training, any special training, any teaching, publishing; just briefly, sir?

A. I graduated from Georgetown University Medical School. Prior to that, from Georgetown University with a bachelor's degree. And then had an internship at Gallanger Municipal Hospital, a fellowship at Georgetown for two years; and then for two years following that at New York University in Bellvue Hospital in New York.

Then five years after that I was the Chief of Dermatology Section for the United States Army, establishing a pilot program for them, and providing training for a small number of the 60,000 physicians who came on active duty.

We turned out "specialists" in 30 days at that time.

(Laughter.)

I came back and became the consultant to the V.A. Hospital, consultant to Walter Reed, the Army; and subsequently the Navy, and subsequently became the national consultant for the Air Force.

I am clinical professor of medicine at Georgetown, and professor of dermatology at Howard; I maintain a rotation service in the office for residents and students who come in for observation and training; and I have a routine of going to the several hospitals I mentioned — that's the Navy, Walter Reed — as part of a teaching program that they have established in those institutions.

I carried on a similar program at Georgetown and at Howard. I am interested in a number of dermatological problems, some of which are esoteric, and have published material on them.

Q. Doctor, I think that will do.

Mr. Turner: I tender Dr. Stolar as an expert witness in the field of dermatology.

Do you have any questions?

Mrs. Endress: No. questions.

By Mr. Turner:

Q. Dr. Stolar, at my request did you examine Mr. William Hensley?

A. Yes, I did.

Q. And were you furnished any medical information regarding Mr. Hensley prior to your examination?

A. I received two letters, one by Dr. Donald Mitchell, and one from Dr. Thomas Nigra.

Q. Doctor, when did you examine Mr. Hensley?

A. On May 15, 1978.

Q. Doctor, would you tell us about your examination of Mr. Hensley?

A. Mr. Hensley gave me a history of a long time problem with psoriasis, rather severe; he had extensive lesions on different parts of his body, and during the course of his various treatments, primarily at Group Health, as he told me, he received local treatments, ointments, lotions; also Methotrexate treatment, which is a very potent anthametololite, and generally a very effective one.

And as time progressed he became accustomed or attenuated to the various treatments, and when I last — when I saw him, he was getting ready to obtain the PUVA treatment.

* * *

He had at the time I saw him lesions on varying parts of the body, I took photographs of areas that he complained of mostly.

Q. May we see those photographs, sir?

(Pause.)

JUDGE GIESEY: Off the record.

(Discussion off the record.)

JUDGE GIESDEY: Back on the record.

MR. TURNER: Would the reporter please mark these six photographs; I would like to have them, I guess, Marked as Exhibits 1 through 6.

* * *

Q: Doctor, as a result of the history you obtained in the course of your own examination, did you with reasonable medical certainty come to a conclusion regarding any causal connection between the condition you saw and the occupation of Mr. Hensley?

A: I know — in the first place, I do not know the cause of psoriasis; so, when anyone comes to me and says, this is the cause of it, I am then put on my hind-quarters, old hind-quarters, as to just what would cause it, when I don't know the cause, and when I cannot find any supportive evidence of cause anywhere; then I feel that I could not say that anything Mr. Hensley did or was subjected to could be a cause of psoriasis.

Q: Now, Doctor, then your medical opinion is, that was not a cause?

A: That is right.

Q: Is that my understanding?

JUDGE GIESEY: What was not a cause.

MR. TURNER: The occupation.

JUDGE GIESEY: That's not how I understand that testimony, and I don't want the record to be confused.

The testimony I understand the Doctor gave was that he does not know the cause of psoriasis, and that was general; is that correct, sir?

THE WITNESS: Correct, sir.

JUDGE GIESEY: There is a far cry between not knowing the cause and being able to rule out something as a cause. Let's get the record straight:

Can you rule out occupation as a cause, or contributing agent in psoriasis?

THE WITNESS: There are no supportive records in the literature that any specific occupation or specific activity produces psoriasis. There are no such available.

JUDGE GIESEY: As a scientist, is that the same as saying they do not exist?

THE WITNESS: No, no. The cause is unknown. That is all. But they do exist.

I brought along two major textbooks that state, start out their discussion, "The cause is unknown." I thought I would after reviewing at least eight or ten different texts in the literature subsequent to Mr. Turner's request — none would venture a cause or causal relationship with any activity that anyone had.

* * *

Q: Doctor, then, let me ask my question in a sightly different way:

You say there are no known causes; can you with reasonable medical certainty say that the occupation of Mr. Hensley did or did not cause?

A: In my experience the pattern of work that he carried on does not produce psoriatic lesions by the only known traumatic mechanism which I mentioned for the Koebner phenomena, which would require a different type of injury than what I could visualize that he received at any time.

Q: Now, Doctor, you mentioned this Koebner phenomenon, tell us a little bit more about that? What is required to produce the Koebner phenomenon?

JUDGE GIESEY: Spell it, first, please, Doctor?

THE WITNESS: KOEBNER.

There are a number of diseases which under certain types of stimuli, severely traumatic stimuli, will respond as part of the healing process with the lesions of those diseases.

* * *

CROSS-EXAMINATION

BY MRS. ENDRESS:

Q: Doctor, you testified that the cause of psoriasis is basically unknown, is that correct?

A: That is right.

* * *

Q: Could trauma precipitate psoriatic erruption, Doctor, in an individual?

A: There are about five to six million people in this country that have psoriasis. I think that the overwhelming number never assoicate trauma with psoriasis; so of the patients that I have, which number, oh, probably in the hundreds, none come in complaining that trauma is the precipitating cause of psoriasis.

Q: Doctor, I am not saying precipitating cause, I am saying a precipitating factor, something that would hasten or aggravate the condition?

Now, we know the cause is unknown, what I am asking you is: are there factors that would make the condition worse, or precipitate the condition, worsen the condition?

A: You say, are there factors?

Q: Yes?

A: Well, may I cite an example?

Q: Surely.

A: Of a factor?

There is a recent, not too long ago, there was a 16-year old girl that came into the office, did not have anything until two days before her mother brought her in; and she had psoriatic lesions from head to foot.

And so, I had the mother go out of the room while I questioned the girl as to what factors came into the picture.

She said three nights before she had beer out on a date and her boyfriend kissed her; and she was positive that she was pregnant; and she went into a rather deep depression about it. And two days later she erupted all over.

Now, I was — between the young lady and myself, I was compelled to tell her, yes, I think his kissing you precipitated the psoriasis. But, I said, now that you know that you are not pregnant, and this does not cause pregnancy, I think we can discard that and you can feel much better.

She called me a week later and said it had cleared up without any medication at all.

So I don't know what factors may produce it, because if something is as esoteric as that can produce it — which I believe it did — then anything, blinking an eyelash, or watching somebody get shot on the street, or getting hit by an automobile, or something, may produce it too, possibly — not product it, but precipitate it.

I really honestly don't feel that I can say that there are factors.

* * *

Q: All right.

Doctor, you read the medical report of Dr. Thomas Nigra?

A: Yes.

Q: Dated November 30, 1977?

A: Yes.

Q: I am going to show it to you. Do you have it with you, Doctor?

A: I think I do.

Q: I am going to ask you to just review that report if you could, very quickly?

A: Yes, I have it right here, November 30, 1977?

Q: Yes.

Doctor, do you agree or disagree with Dr. Nigra's statement that — I will read it:

"Psoriasis is a capricious disease which waxes and wanes and comes and goes without cause."

A: Yes.

Q: Do you agree or disagree with this next statement?

"However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the traumatic area."

A: No, because I don't know what he means by "trauma". Because he is producing trauma every day and he doesn't know whether he is going to have a good result or a bad result. He tells me that.

Q: So, do you agree or disagree with that statement?

A: I disagree.

Q: Fine, thank you.

Do you agree or disagree with his next statement:

"It is my opinion that using his hands in his work the way Mr. Hensley does as a bus driver could result in trauma and therefore flaring of his basic condition."

A: I disagree with that, also.

Q: Thank you, Doctor.

Have you read the medical report of Dr. Donald Mitchell dated November 30, 1977?

A: Yes, I have.

Q: Could I ask you just to briefly review that report?

A: Yes.

Q: I am going to ask you, Doctor, if you agree or disagree with Dr. Mitchell's statement:

"This condition is work aggravated as is demonstrated by the extensive psoriasis involving the palms and soles."

A: I disagree because that does not follow at all.

Q: All right.

Do you agree or disagree with his next statement:

"The patient will continue to have aggravation of his psoriasis as long as he continues his present occupation as a bus operator."

A: I disagree with that. He has been working for 15 or 20 years with his psoriasis.

Q: All right, thank you, Doctor.

Now, you examined Mr. Hensley May 15, 1977; is that correct?

A: That is correct.

* * *

EXAMINATION BY THE COURT

BY JUDGE GIESEY:

Q: Doctor, I would like to allow you to correct the record. Your last answer I believe was that speaking of the claimant he needed to have something done to produce this improvement, or works to that effect.

Now, in your testimony you recounted the non-treatment of a 16-year old girl who not only improved but cleared completely, without treatment?

A: Yes.

Q: So do you want to correct that? You did not mean he needed to have something done, you mean it meant in your opinion he probably needed to have something done?

A: No, he probably had something done, probably had something done.

Q: Had been done?

A: Yes, something done.

Q: Now, do you know, Doctor, in your experience and reading, and so forth, do you know of any literature or have you had any experience which would indicate that stresses associated with an occupation precipitate or produce a worsening in the condition known as psoriasis?

A: There are papers that use stress as a triggering mechanism for the worsening of psoriasis. There are some; there are such papers.

Q: Do you agree with that? Does that comport with your experience?

A: I think that is correct. I think the case I cited of the young lady was purely one of stress, stress and distress.

(Laughter.)

Q: I presume you would agree that concerning the mental effects of stress a psychiatrist would be expert, the best source of information; is that correct?

A: They vie away from psoriasis.

Q: They do?

A: I know of none who is willing to tackle a patient with psoriasis.

Q: In your expert opinion you would not characterize psychiatry as a viable or useful or usual treatment for psoraisis; is that correct?

A: That is right.

Q: How about the removal of a stress, stressful situation?

A: Stress is such an individual thing that it is almost impossible to know how you are either implicating or removal individuals from those situations. When an individual works with psoraisis for many years, you assume that to some degree — to some degree — he has adjusted to his psoriasis; although he may hate it every minute of his conscious time.

But to adapt to the ordinary course of living, he has then adapted to the disability of psoraisis.

Q: Were you considering stress as precipitating or worsening the condition in a patient with psoraisis if the patient recounted to you his having practiced medicine for many years and noticed no change in his condition, you would rule out his occupation as a contributing factor; is that correct?

A: Well, I have several physicians as patients and their psoraisis fluctuates up and down.

Now, occasionally we will try to discuss what stressful situations they have been in prior to an exaccerbation of the condition. And in talking to them some of their lightest, nonstressful periods, the conditon has gotten worse; whereas when they have been under heavy pressure and they are under multiple pressures from different angles, for some reason it's better.

So I don't know just how to really basically evaluate it.

* * *

RECROSS-EXAMINATION

BY MRS. ENDRESS:

* * *

Q: Would it be your opinion that gripping a steering wheel on a continuous basis would not have an affect on the worsening of his psoraisis?

A: Probably not.

* * *

WASHINGTON HOSPITAL CENTER
110 IRVING STREET, N.W.
WASHINGTON D.C. 20010

November 30, 1977

Mrs. Carolyn McKenny Endress
Ashcraft, Gerel, and Koonz
Attorneys and Counsellors at Law
Suite 303
2101 L St. NW
Washington DC 20037

RE: William D. Hensley

Dear Mrs. Endress

Thank you for your letter regarding Mr. William Hensley. I saw him on October 26, 1977 in consultation during which time I received the following history.

He has had psoriasis for ten years and was reasonably well controlled until approximately six years ago. *He had dental surgery in the summer of 1977, and following that his psoriasis flared badly*. He has been a patient of Group Health Association and was referred to me from the National Institutes of Health. He has been on Methotrexate since the summer of 77, 35 mg. weekly, which has controlled his psoriasis to a certain degree. He was off of Methotrexate for five weeks, but then he had a severe flare and needed to go back on the drug which he has done.

When I saw him, he had physically disabling psoriasis of his left hand. He is a Metro Bus driver, and there is little question that he uses his hands in his work.

Psoriasis is a capricious disease which waxes and wanes and comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the

traumatic area. It is my opinion that using his hands in his work the way Mr. Hensley does as a bus driver could result in trauma and therefore flaring of his basic condition.

Thank you very much.

With best regards,

/s/ THOMAS P. NIGRA, M.D.
Thomas P. Nigra, M.D.
Chairman, Dermatology Section

TPN/bs

GROUP HEALTH ASSOCIATION, INC.
2121 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037

November 3, 1977

Carolyn M. Endress, Esquire
Ashcraft, Gerel & Koonz
Attorneys and Counsellors at Law
2101 L Street, N.W., Suite 303
Washington, D.C. 20037

RE: HENSLEY, WILLIAM D.
GHA# 101162-01
MR# 081-691

Dear Ms. Endress:

This is in response to your request for information on the above-named patient.

Mr. Hensley has been under the care of the Dermatology Department for long-term chronic generalized psoriasis. He was initially seen in December 1967 and has been treated intermittently since that time. He has been treated with Methotrexate, ultraviolet light treatments and topical steriods. This condition is work aggravated as is demonstrated by the extensive psoriasis involving the palms and soles. The patient will continue to have aggravation of his psoriasis as long as he continues his present occupation as a bus operator. He is, however, qualified for an alternate position with the bus company if this could be arranged.

I hope this information will be useful in your efforts to assist Mr. Hensley.

Sincerely,

/s/ DONALD E. MITCHELL, M.D.
Donald E. Mitchell, M.D.
Department of Dermatology

DEM:rw
Enclosure

WASHINGTON HOSPITAL CENTER
110 IRVING STREET N.W.
WASHINGTON D.C. 20010

March 27, 1978

Dr. Donald Mitchell
Group Health Association, Inc.
2121 Pennsylvania Avenue, N.W.
Washington, D.C.

RE: William D. Hensley

Dear Don:

Thank you for asking me to see Mr. William Hensley, a 55 year old bus driver with Metrobus, who I saw originally on October 26, 1977. A copy of the letter that I sent to the attorneys regarding the consultation is enclosed with this letter.

Mr. Hensley, since that period of time, tells me that he has been receiving intensive ultraviolet light treatments from you for the last two months which had controlled the psoriasis somewhat but had not actually cleared it. I gather that you are referring him now to me for consideration of phototherapy.

Today on physical examination, there is extensive involvement of his left hand which is greater than the right and both are indeed involved. In addition, his feet are both involved. There is marked involvement of the genital area, the gluteal cleft area, there is a large plaque on his back, small guttate lesions on his anterior chest and a number of 1cm. to 2cm. lesions on his lower extremities.

Because of the extensive nature to his psoriasis, although it does not actually involve 25% it does involve the genital area and it is occupationally disabling, he has not been at work since October 1977.

I feel that the above criteria are realistic and reasonable and with the failure of all other forms of therapy to consider

phototherapy for this gentleman. I will be happy on the basis of your authorization to enter him into our phototherapy program. I am not certain if the authorization you sent to me as of March 15, 1978, was for this although I tend to believe it is. I would like to receive a small note from you confirming that fact.

Thank you very much for referring Mr. Hensley.

With best regards,

/s/ THOMAS P. NIGRA, M.D.
Thomas P. Nigra, M.D.
Chairman, Dermatology Section

TPN/lmp

ROBERT STOLAR, M.D., P.C.
SUITE 501
1145 19th STREET, N.W.
WASHINGTON, D.C. 20036

May 24, 1978

Name of Patient: William D. Hensley
Date of Birth: 7/29/22

Summary of Records

Dates Seen

5/15/78

History, Description, Treatment

Patient is a 55 year old male who come in for evaluation of his psoriasis with numerous lesions on varying parts of the body. He stated that he has been a driver for the various companies in the District of Columbia for the past thirty-two years. He started with the Capitol Transit Company, then the D.C. Transit Company, and finally the Washington Metropolitan Transit Authority known as Metro.

He started work on July 11, 1946, following a training period which began on June 15, 1946. He received annual physical examinations by the various companies and this has been continued by Metro. About 1958, he developed what was called bus driver's itch. This was an eruption over the perineum and it was seen by the physician on his annual physical examinations, but there was no treatment for this. About 1963, or earlier, he reported to Dr. Donald Mitchell at the Group Health Association who treated him for psoriasis with ointments on different parts of the body. This made him reasonably confortable and then with the spread of the disease in 1968, he started taking Methotrexate. He began with 14 tablets at a time equalling 35 mg. every two weeks. There were

blood studies and platelet counts done. In 1968, after ten weeks of treatment which consisted of five doses of the 35 mg. each there was good control. He was relatively clear until 1974, when he started on Methotrexate again. He was under good control for a couple of years and started again with Methotrexate in September of 1977, when he took four doses in eight weeks. He stopped the Methotrexate in Mid-October of 1977. Also during this time he used Topsyn Gel, Baker's P&S Liquid for the scalp, and he also had ultra violet treatment with Balnetar Lotion on the body in December of 1977. He continued this through March 15, 1978. Appears to have been the Goeckerman type treatment. He was then referred to Dr. Tom Nigra for PUVA treatments. A telephone call to Dr. Nigra today, indicated that the prior records from Group Hospitalization had arrived there and that they would start the PUVA treatment soon. Examination revealed the following symptoms. The patient has claimed that he had severe itching and that often the lesions are painful when they split open and bleed. Examination revealed the scalp to be heavily crusted all over. He had an area that was crusted transversely across the upper abdomen about 8 cm. wide in numerous small crusted lesions and extending to each flank. He has marked erythematous lesions in the groins and the perineum including the upper inner thighs. He has two spots on the knees each about 3 cm. in diameter and he has involvement of the feet with varying lesions from 2-3 cm. in diameter and involvement of the toes and large patches on the soles. The elbows also have lesions about 10 cm. by 6 cm. wide. The center of the back in the lumbar region extending out to about 12-14 cm. from the center show thick crusted areas. The buttocks has a number of discreet crusted lesions and the internatal area has an extensive crusted area. The fingers and nails show involvement. The left palm is rather extensively involved, the whole palm being erythematous and hard as well as the

volar surfaces fo the fingers. The right palm shows two crusted patches, one over the thenar eminence about 4 cm. in diameter and one over the ulnar margin towards the distal portion of the palm about 3 cm. in diameter. He is right handed. The remainder of the palm is clear, the right palm. I looked for evidence of Koebner phenomenon, but did not find any. The varying lesions appear to be spontaneous and well established. He has received the 8 Methoxypsoralen with instructions on how to take it by Dr. Thomas Nigra.

ROBERT STOLAR, M.D., P.C.
SUITE 501
1145 19th STREET N.W.
WASHINGTON D.C. 20036

May 24, 1978

Mr. Richard W. Turner
Hamilton and Hamilton
Union First Bank Building
Washington, D.C. 20005

Dear Mr. Turner:

Following is a copy of my medical record following the examination of Mr. William D. Hensley in my office on May 15, 1978. I did not have, although I understand it has been available, a copy of the earlier Group Health Association records other than the report of Dr. Donald E. Mitchell in which he states that Mr. Hensley's "psoriasis is work aggravated as is demonstrated by the extensive psoriasis involving the palms and soles. The patient will continue to have aggravation of his psoriasis as long as he continues his present occupation as a bus operator. He is, however, qualified for an alternate position with the bus company if this could be arranged."

As you will note from the extract from my medical record, Mr. Hensley has heavy psoriatic lesions on the scalp. He has them transversely across the abdomen where he says he was burned by the ultra violet lamp and he did not have the lesions there until he was so burnt while under treatment. Now such a burn may produce a so called Koebner phenomenon, but it has to be rather severe and this is possible as has been demonstrated by severe burning in other patients in the past. Koebner phenomenon is a mechanism whereby a psoriatic lesion will occur following a severe traumatic injury usually of enough intensity to produce a change in the dermis or subcutaneous tissues whereby the blood vessel pattern is altered,

stimulated, and a response may occur with a psoriatic lesion. This may occur with a deep scratch or severe burning. I have never seen it from a routine frictional pattern on the surface. There are experimental evidences which indicate that frictional patterns to remove the scale repeatedly applied does not produce but may actually improve the psoriatic lesion. An experimental use of a polyester fiber sponge as an adjunct to the treatment of psoriasis was carried out by Dr. William V.R. Shellow and reported in the March, 1978, issue of Cutis, a dermatologic journal. The rough fiber sponge was used to remove the scaling and there was improvement of the psoriasis. This has been carried through by many routines of treatment. I could not visualize how his shoes would create a frictional pattern of enough intensity to produce a psoriatic response on his soles as was indicated by Dr. Mitchell. He uses both hands in his work and there is a frictional pattern on the right palm, but it apparently was not of enough severity to create an extensive psoriatic eruption over the whole palm and palmar surfaces of the fingers.

As to the relationship of the dental work done on Mr. Hensley by Dr. Harry E. Ferris, I could not relate anything that was done to him in that respect having any effect on his psoriasis. Psoriasis has so many spontaneous increases and decreases, and lesions, and extent that it is impossible to determine that any one pattern of injury may definitely be the responsible agent for its manifestations.

I agree with Dr. Thomas P. Nigra's statement "psoriasis is a capricious disease which waxes and wanes and comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the traumatic area." However, that trauma must be sharp and intensive enough to establish a response and almost always that response is linear.

There is no question that Mr. William D. Hensley has an unfortunate and to a great extent disabling condition of

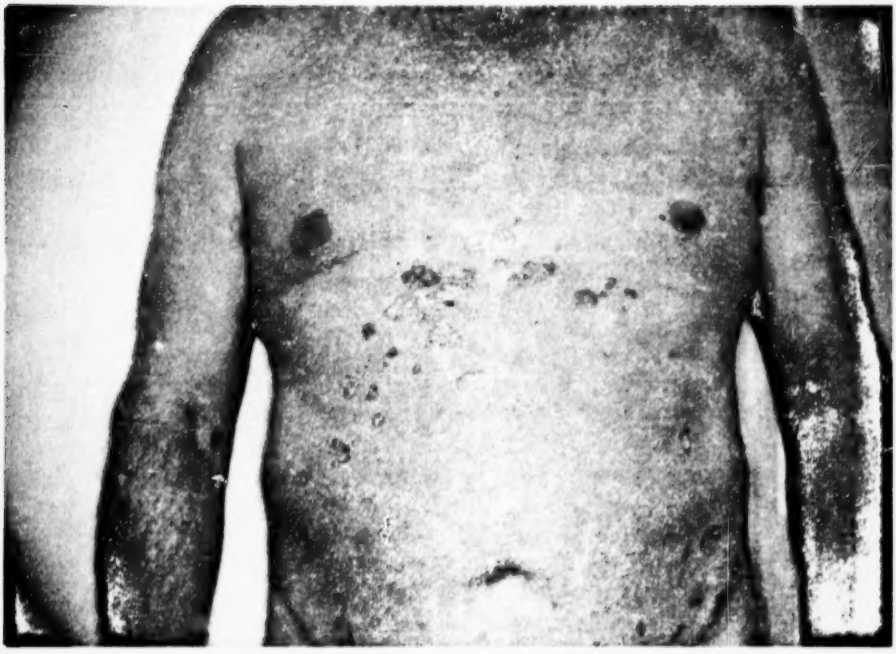
psoriasis; however, in attempting to evaluate it from his history and examination, I was unable to determine that it was work related or work aggravated.

Sincerely yours,

/s/ ROBERT STOLAR, M.D.
Robert Stolar, M.D.

RS:cmb
Enclosures

EMPLOYEE'S EXHIBIT 1



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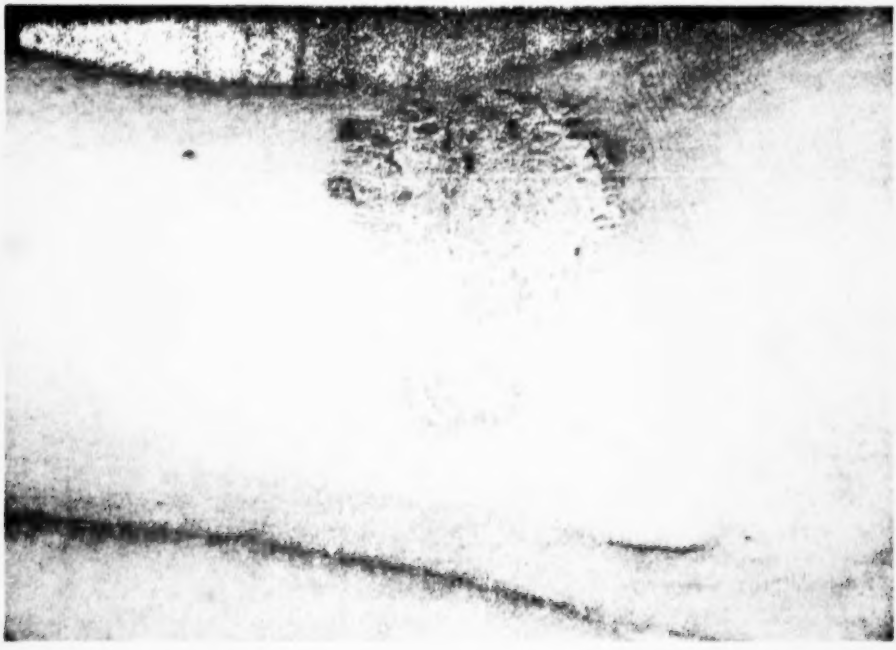

EMPLOYEE'S EXHIBIT 3

EMPLOYEE'S EXHIBIT 4

EMPLOYEE'S EXHIBIT 5

EMPLOYEE'S EXHIBIT 6

APPENDIX E

Walker v. Universal Terminal & Stevedoring Corp. ___ F2d ___ (3rd Cir., 1981)
(Reported also at 13 B.R.B.S. 257)

APPENDIX E

Walker v. Universal Terminal & Stevedoring Corp.
_____ F2d _____ (3rd Cir., Apr. 10, 1981)
(Reported also at 13 B.R.B.S. 257)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2142

METHEL WALKER, Claimant, *Respondent*

v.

UNIVERSAL TERMINAL & STEVEDORING CORP.,
Employer,
and MIDLAND INSURANCE COMPANY, Carrier,
Petitioners

ON PETITION FOR REVIEW OF A DECISION OF THE BENEFITS REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF LABOR AT NOS. 78-541 AND 77-102

Argued January 12, 1981

Before: SEITZ, *Chief Judge*, ROSENN and SLOVITER
Circuit Judges

(Opinion Filed April 10, 1981)

LEONARD J. LINDEN, ESQUIRE (Argued)
Linden & Gallagher
20 Vesey Street
New York, New York 10007
Attorneys for Petitioners

JOHN R. SCHWARTZ, ESQUIRE (Argued)
Miller, Hochman, Meyerson
& Schaeffer
40 Journal Square
Jersey City, New Jersey 07306
Attorneys for Claimant-Respondent

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OPINION OF THE COURT

ROSENN, *Circuit Judge*

Jessie Walker, a longshoreman, died while at work unloading a vessel on August 21, 1971. His widow, Methel Walker,[1] filed a workmen's compensation claim under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-950 (1976 & Supp. III 1979). An administrative law judge (ALJ) denied the claim, finding that Walker's death was caused solely by intoxication. The Benefits Review Board (BRB) reversed on the ground that the ALJ's decision was not supported by substantial evidence. Following a remand to the ALJ for computation of the amount of compensation and a subsequent affirmance by the BRB, the decedent's employer, Universal Terminal & Stevedoring Corp., and its insurance carrier, Midland Insurance Co., petitioned this court for review. We grant the petition and, concluding that the decision of the ALJ was amply supported by substantial evidence, reverse the decision of the BRB.

I.

On August 20, 1971, Walker, a longshoreman employed by Universal Terminal & Stevedoring Corp., was assigned to work on the vessel American Legend at Port Newark, New Jersey. He began work at approximately 1 p.m. on the deck of the ship with a fellow longshoreman, Lindo Pugh. Their sole task was attaching hooks from the large overhead crane to the top of hatch covers so that the hatch covers could be removed making the cargo below accessible. In carrying out their assignment that afternoon, Walker and Pugh climbed on top of a hatch, an elevation of five to six feet above the deck.

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1. During the initial proceedings, Mrs. Walker's first name was identified as "Methal." She subsequently has been identified as "Methel," the spelling we shall use.

They reached the top by climbing short ladders along the sides of the hatch. After they had assisted in attaching the cable from the crane to the hatch cover, each man prepared to descend from the cover. Pugh grabbed an adjacent cable and slid the short distance down it to the deck. Walker was observed crouching as if to jump to the deck. No one saw him actually alight from the hatch cover. Several minutes later, Pugh went looking for him and found Walker lying unconscious on the deck beside the hatch. Nearby, permanently attached to the deck, was a 2 1/2 or 3 inch pipe. This pipe ran parallel to the deck a few inches above the surface. Pugh saw no indication, however, that Walker had struck the pipe or the deck.

Pugh obtained assistance and with the aid of the crane, operated throughout that afternoon by Edward Muse, Walker was removed from the ship on a stretcher. He was pronounced dead on arrival at the hospital. The specific physiological cause of death is not at issue: Walker, in a semi-conscious state, had vomited, aspirated the vomit, and asphyxiated. In dispute is what triggered these events. The claimant argues that either falling or jumping from the hatch cover, Walker struck his head and was rendered partially unconscious. The employer and insurance carrier contend that Walker became partially unconscious solely as a result of the intoxication. As is often the case, each side presented medical testimony in support of its position at the hearing on the workmen's compensation claim.

Relying on the evidence produced at the administrative hearing, the ALJ concluded that Walker's death was caused solely by his intoxication. To reach this conclusion he specifically credited the testimony of Dr. Milton Halpern and rejected, on one point, the testimony of Dr. Thomas Santoro. On appeal of the claimant, the Benefits Review Board of the United States Department of Labor reversed, holding that the ALJ's decision was not supported by substantial evidence.

II.

This court previously has considered the initial and review procedures appropriate in cases involving claims for compensation under the LHWCA:

> A disputed claim for compensation is first heard before an ALJ. The ALJ makes findings of fact and determines the validity of the claim. 33 U.S.C. §919. The losing party may appeal to the BRB which reviews the ALJ's decision but it does not make any independent findings of fact. 33 U.S.C. §921. The statute provides for the BRB's scope of review: "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921(b)(3).
>
> A dissatisfied litigant may then file a petition for review of the BRB decision in the United States court of appeals. 33 U.S.C. §921(c). The statute does not set forth the standard of review to be applied in the court of appeals. Case law has established, however, that this court is to review the decisions of the Benefits Review Board for errors of law, and to make certain that the BRB adhered to its scope of review provision. *Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 76 n.12 (3d Cir. 1978); *Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 454 (3d Cir. 1978); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433 (5th Cir. 1976).
>
> . . .
>
> It is true that this court does not determine if the Board's decision is supported by substantial evidence; we review the Board's determination of whether the ALJ's decision is supported by substantial evidence. In order to determine whether the Board has properly adhered to its scope of review,

> the court of appeals must make an independent review of the record and decide whether the ALJ's findings are supported by substantial evidence.

Sun Shipbuilding & Dry Dock Co. v. McCabe, 593 F.2d 234, 237 (3d Cir. 1979) (footnote omitted).[2] This approach—reviewing the Board's determination of whether the *ALJ's decision* was supported by substantial evidence, rather than determining whether the *BRB's decision* was supported by substantial evidence—is followed in other circuits. *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327, 1329 & nn.1 & 2 (9th Cir. 1980); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980); *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 606 F.2d 1324, 1326 (D.C. Cir. 1979), rev'd on other grounds, 49 U.S.L.W. 4063 (U.S. Dec. 15, 1980); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir. 1979).[3] We see no reason to reconsider the standard of review in this case.

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2. The scope of BRB review of the decision of the ALJ is also limited by regulation.

> The Benefits Review Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

20 C.F.R. §802.301 (1980).

3. Although the standard of review is not disputed by the parties in this case, we note that other circuits have stated that the decision of the *BRB* should be upheld if it is supported by substantial evidence. Maryland Shipbuilding and Drydock Co. v. Director, Office of Workers' Compensation Programs, 618 F.2d 1082, 1084-85 (4th Cir. 1980); Strand v. Hansen Seaway Serv., Ltd., 614 F.2d 572, 574 (7th Cir. 1980). We believe the statements in these cases are not sound. *Maryland Shipbuilding* bases its deference to the BRB

III.

The Act provides that "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(b) (1976). The statute also recognizes a presumption against a finding of intoxication. "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary . . . (c) That the injury was not occasioned solely by the intoxication of the injured employee." *Id.* §920. This presumption has weight, however, only in the absence of substantial evidence negating the presumption. Once evidence has been presented sufficient to justify a finding contrary to the presumption, "the presumption falls out of the case." *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). The presumption does not have the quality of affirmative evidence. *Id.* at 285. Once rebutted, the presumption has

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NOTE 3 — *(Continued)*
on O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), a case decided when review of the decision of the ALJ or "deputy commissioner" was obtained first from a United States District Court, not a BRB. The *Maryland Shipbuilding* court does not specifically consider whether the ALJ's rather than the BRB's decision is entitled to deference, and, in reversing the BRB and reinstating the ALJ's decision, does not *show* much deference for the BRB. The *Strand* court apparently did consciously defer to the BRB instead of the ALJ. However, its support for that deference, two Ninth Circuit decisions, is weak: National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1292 (9th Cir. 1979), without analysis relied on *O'Leary*, distinguished above; Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs, 545 F.2d 1176, 1178-79 (9th Cir. 1976), involved a BRB affirmance of an ALJ and could as easily be read as requiring deference to the ALJ, not the BRB. Further, the Ninth Circuit has since clarified its position, adopting the view held in this circuit. Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327, 1329 & nn.1 & 2 (9th Cir. 1980).

no effect on the case. *St. Louis Shipbuilding Co. v. Director of the Office of Workers' Compensation Programs*, 551 F.2d 1119, 1124 (8th Cir. 1977); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314, 317 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959).

In cases involving LHWCA statutory presumptions, the court must use a two-part test. *Travelers Insurance Co. v. Belair*, 412 F.2d 297, 301 n.6 (1st Cir. 1969). Specifically, in this case, we must first determine if the employer has presented sufficient evidence to rebut the presumption against a finding that Walker's death was caused solely by intoxication. If we conclude the presumption has been rebutted, then we must employ the familiar substantial evidence test to determine if the ALJ's decision is properly supported. *See* part II *supra*. We now apply this test to the facts of this case.

IV.

At the hearing before the ALJ, the claimant and the deceased's employer did not dispute the immediate cause of death: Jessie Walker became only partially conscious, vomited, and subsequently asphyxiated. The claimant, however, maintained the partial unconsciousness was caused when Walker struck his head in the course of jumping or falling from the hatch cover. Universal Terminal contended that the reliable evidence provided no indication of trauma, creating the inference that intoxication was the sole cause of the partial unconsciousness and resulting death.

Two doctors testified in behalf of the claimant: Dr. Thomas A. Santoro, the medical examiner who conducted the autopsy on Jessie Walker, and Dr. Roland Goodman, who based his opinion solely on the reports of Dr. Santoro. Dr. Santoro found *no* evidence of trauma in his external examination of the body. Nor did he find any such evidence in his gross examination of the internal organs and tissues. Based on these observations, he

then concluded that the cause of death was "asphyxiation, due to aspiration of gastric content." This aspiration, the doctor stated, came after Walker had vomited.

Dr. Santoro also had performed a toxicological examination for alcohol. The deceased's brain was found to have an ethyl alcohol content of 0.273 percent. Dr. Santoro concluded that, at the time of his death, Walker "was markedly under the influence of alcohol." In the doctor's opinion, "[a]n individual with an alcoholic content such as I have stated may be unconscious. . . . [S]ome individuals may vomit with an alcohol content of 0.273." The doctor concluded that such intoxication, unconsciousness and vomiting could lead to asphyxiation and death. This was the limit of Dr. Santoro's conclusion when he first made out the autopsy report. At that time *all* evidence indicated to him that intoxication was the sole cause of death.

Dr. Santoro subsequently changed his opinion and amended the autopsy report after (1) learning that Walker had a "[f]all on hatch while at work on ship," Request for Correction or Addition to Original Record of Birth, Marriage or Death, and (2) observing, in one of seventeen slides made with tissues from Walker's body, what he believed to be a concussion hemorrhage. Dr. Santoro admittedly did not personally witness Walker on the ship the day of his death. In fact, no one saw Walker drop from that hatch, so it is impossible to conclude that he fell accidentally or intentionally jumped as was normal. Thus, the only acceptable evidence on which Dr. Santoro could base his conclusion that Walker's death was caused by accidental trauma was the single slide. But Dr. Santoro could not remember if it was he who had cut the tissue visible on that slide. Further, he admitted that he did not know and no records indicated from what section of the brain the specimen was taken.

Dr. Goodman relied solely on Dr. Santoro's autopsy reports and earlier depositions of Dr. Santoro and Walker's two co-workers, Muse and Pugh, for his opinion that "there is no evidence that this patient from the clinical or medical point of view was intoxicated."[4] Of course, Dr. Santoro's own testimony contradicts that opinion. Further, to reach the conclusion, Dr. Goodman admitted that he "was given as a fact to assume that [Walker] had been performing his duties in a normal competent manner." Finally, Dr. Goodman's conclusion that Walker suffered a head trauma was based solely on the autopsy report of Dr. Santoro. Universal Terminal presented two doctors on its behalf, Dr. Milton Halpern, retired Chief Medical Examiner of the City of New York, and Dr. Jacob D. Matis.

Dr. Halpern based his testimony on the report of Dr. Santoro and on *his own examination* of the slides of tissue taken from the body of Jessie Walker. Dr. Halpern's testimony squarely contradicted that of Dr. Santoro as to the presence in any of the slides of indications of hemorrhages or trauma.

> Well, I found no evidence of hemorrhage, hemorrhages, gross or microscopic in any of the brain sections. There is congestion of the small blood vessels.
>
> Concussion hemorrhages when present are not only visible to the naked eye, but would be found on microscopic examination. There does not seem to be any basis in the autopsy for a conclusion of acci-

---

4. The Benefits Review Board, in its initial Walker decision overturning the decision of the ALJ, BRB No. 77-102 (Feb. 28, 1978), stated that "*[t]hree* eye-witnesses [sic] testified that between 1:00 p.m. and 1:45 p.m. decedent was in full control of his body motion up to the time of the injury." In fact, only two co-workers testified to Walker's pre-injury activities, and no other witnesses were even suggested. Such error indicates the minimal scrutiny the BRB gave the record before deciding to overturn the decision of the ALJ as not being supported by substantial evidence.

dental concussion. Now, this is my opinion that I am giving here, of the brain with hemorrhages.

I would therefore consider this a case of acute alchoholism [sic] with terminal regurgitation and aspiration of regurgitated material from the stomach.

Dr. Halpern amplified his conclusion, stating that "there were no hemorrhages noted in the brain and no indication here from the appearance of the brain that you could say this man suffered a concussion." The congestion of the blood vessels that Dr. Halpern found he attributed to alcoholism.

I think everyone who is acutely alchoholic [sic] develops a congestion of the tissues and organs of the body. If a person dies during an acute alchoholic [sic] episode, then this congestion will be evident. In fact, it is the most common finding in a person dying of alchoholism [sic], to find his organs congested.

The doctor not only disputed the only evidence of trauma, but provided a reasonable explanation of the condition that Dr. Santoro concluded was a hemorrhage.

Dr. Halpern also opined that had Walker suffered a head trauma of a type likely to have been caused by striking a pipe or the deck evidence other than that visible microscopically would have been observed.

[W]hen you get concussion of the brain due to a blunt-force injury of a diffuse or jarring type — you may not see anything on the outside of the scalp, but when you turn the scalp around or lay it back so that you can see the inside, you do find bruising of the scalp, on the inside. There was no injury of the scalp on the outside in this case. There was no bruising of the scalp on the inside and no hemorrhages to warrant a conclusion that there was a concussion effect in this man.

This injury to the scalp, Dr. Halpern stated, would appear immediately after the trauma and in all cases.

> When you bump your head for example, sometimes like going through a door, you may not see anything on the outside. You feel discomfort. Now, on occasions where you have an opportunity of turning the scalp back, *you always find it.*

(Emphasis added). This bruising, Dr. Halpern testified, would appear even if the injury occurred *after* death.

Thus, Dr. Halpern's opinion contradicted that of Dr. Santoro in two significant ways. First, he found nothing on the slides—the only source for Dr. Santoro's conclusion that Walker suffered a blow to his head—indicating hemorrhages or trauma. Second, relying on Dr. Santoro's observations that there was no other internal or external evidence of trauma, Dr. Halpern concluded that no trauma could have occurred, because it would have shown up on the inside of the scalp.

Dr. Halpern agreed with Dr. Santoro that Walker was intoxicated, both contradicting the testimony of Dr. Goodman. Dr. Halpern stated that the 0.273 percent level of alcohol "is a very large amount and that amount would indicate intoxication." According to Dr. Halpern, this level of alcohol would have been built up only by drinking approximately eight ounces of hard liquor.

Although accepting the testimony of Muse and Pugh that Walker did not exhibit by his conduct indications of intoxication and recognizing that Walker was found on the deck near a pipe, Dr. Halpern concluded that intoxication was the sole cause of Walker's death.

> I can only find one explanation, one primary explanation or cause of this man's death and that is astute [sic] alchoholism [sic] with loss of consciousness, with aspiration of regurgitated material. If he hadn't regurgitated, he might have gotten over that acute attack of alchoholism [sic], but the fact is that

he did regurgitate and he did aspirate. That is not an uncommon termination for a person who is under the influence of alchohol [sic].

I see nothing in this man's activity that is a factor in his death. I found no evidence of any traumatic injury, either grossly or microscopically. The only thing the autopsy revealed was a large amount of alchohol [sic] in the brain and so he had a case of acute alchoholism [sic].

. . .

The primary cause of death here is acute alchoholism [sic] and the complication that might have hastened his death was the regurgitation and aspiration of vomit, which happens very often in alchoholics [sic].

I find no indication of any injury here and no external injuries and no internal injuries, no anything in the way of traumas.

Dr. Halpern specifically discounted testimony of Walker's co-workers that Walker did not appear to be under the influence of alcohol "[b]ecause many persons who are under the influence of alchohol [sic] are not recognized as being in that state." Dr. Halpern found no other cause of Walker's death than alcohol.

Dr. Jacob D. Matis based his testimony on the reports of Drs. Santoro and Halpern. Not surprisingly, his statements added little. However, it is important to note that Dr. Matis agreed with Dr. Halpern that concussion hemorrhages would have been discernable not only in the single slide.

You don't get concussion hemorrhages without concommitent [sic] changes in the surrounding tissue. In other words, you can't traumatize the skull or the scalp or the meninges . . . and not show it. If you show only what is called concussion hemorrhages, something is wrong somewhere.

This was the extent of the medical testimony on which the ALJ had to base his decision whether intoxication was the sole cause of Jessie Walker's death.

We hold that the administrative law judge was correct in concluding that the presumption against a finding that intoxication was the sole cause of death was rebutted. Only Dr. Goodman testified that Walker was not intoxicated. Both Dr. Santoro, claimant's witness, and Dr. Halpern gave opinions that, on the basis of the undisputed test showing 0.273 percent alcohol in Walker's brain, the deceased was intoxicated. Further, the sole evidence of another cause, trauma, was the testimony of Dr. Santoro based on a single slide, and was refuted by the testimony of Dr. Halpern, who viewed the same slide. Finally, the testimony of both Drs. Halpern and Matis was clear that there was no evidence of another cause and that all the evidence indicated that trauma, the cause asserted by claimant, could not have been a cause.

We hold further that, with the presumption out of the case, the ALJ was amply supported by substantial evidence in the record as a whole for his conclusion that intoxication was the sole cause of Walker's death. Again the testimony of Dr. Halpern directly supports that conclusion. The employer need not introduce evidence refuting every imaginable theory of death.In this case there are only two plausible theories as to what triggered Walker's vomiting: The first, advanced by the claimant, is trauma—a blow to the head—that resulted in semi-consciousness and the vomiting in a man with a considerable amount of alcohol in his system. The second, urged by the employer, is the intoxication alone. Dr. Santoro's testimony that a slide showed a concussion hemorrhage is evidence, the only evidence, in support of the first. Dr. Halpern's testimony that the slide shows congestion from alcoholism, not hemorrhages, and that the requisite evidence of head trauma, bruises on the in-

terior of the scalp, was missing, directly contradicts the testimony of Dr. Santoro and is evidence in support of the second theory. The administrative law judge was thus forced to make a choice based on the credibility of the two doctors. Had the ALJ decided to accept the version of Dr. Santoro, we could not say that there was not substantial evidence in support of that theory. *See C.F. Lytle Co. v. Whipple*, 156 F.2d 155, 156 (9th Cir. 1946). But the ALJ did not accept his testimony. He specifically gave the testimony of Dr. Halpern "the greatest weight in evaluating the conflicting evidence of the autopsy." He thus accepted Dr. Halpern's opinion (1) that the slide showed alcohol-induced congestion, not hemorrhages, and (2) that if there had been even a gentle bump to Walker's head there would have been bruising on the inside of the scalp that would have been visible when the scalp was turned back. The ALJ therefore accepted the conclusion of the doctor that "the deceased did not strike his head either before or after death." In sum, the administrative law judge concluded:

> Therefore, it is found that Jessie Walker died on August 20, 1971, of asphyxia due to the aspiration of stomach contents as a result of loss of consciousness due to acute alchoholism [sic]. In other words the death was occasioned solely by the intoxiation [sic] of the employee and not due to an injury arising out of or in the course of employment.

(Footnote omitted). We cannot say that the ALJ was not supported by substantial evidence in crediting the testimony of Dr. Halpern, accepting the employer's theory of the cause of Walker's death and holding that the longshoreman's death was caused solely by intoxication. Because we believe the ALJ's conclusion was supported by substantial evidence, we hold that the Benefits Review Board exceeded its scope of review.

Therefore, the decision of the Benefits Review Board will be reversed with directions to reinstate the original decision of the Administrative Law Judge denying the claim of Methel Walker for death benefits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,

No. 80-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Petitioner,

v.

WILLIAM DAVID HENSLEY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAROLYN McKENNEY
(Counsel of Record)
JOSEPH H. KOONZ, JR.
ROGER C. JOHNSON
KOONZ, McKENNEY & JOHNSON
2020 K Street, N.W.
Suite 840
Washington, D.C. 20006
(202) 659-5500
Attorneys for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

Whether the United States Court of Appeals adhered to the statutorily mandated standard of review in its reversal of a denied claim for workers' compensation benefits under 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia pursuant to 36 D.C. Code § 501 *et seq.*

PARTIES BELOW

In the Court below, Petitioner Washington Metropolitan Area Transit Authority, appeared as Respondent, and William D. Hensley, Respondent herein, appeared as Petitioner. The Director, Office of Workers' Compensation, U.S. Department of Labor, did not appear in the Court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2128

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Petitioner,

v.

WILLIAM DAVID HENSLEY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported in the official reports, but has been reported at 13 BRBS 182 (1981). The Decision of the Benefits Review Board of the Department of Labor is reported at 11 BRBS 468 (1979). The Opinion and Order of the Administrative Law Judge of the Office of Workers' Compensation Programs is an unreported opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1981. No petition for re-hearing was filed in that Court. Jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

The respondent in this case, William David Hensley, has driven a bus in the District of Columbia for more than 30 years. As a bus driver, Mr. Hensley spent most of his working day sitting, using his hands and feet to operate the bus. Mr. Hensley has had psoriasis since 1967, but before August 1977 his condition was medically controlled and had never interfered with his work.

In June and July 1977, Mr. Hensley's working conditions changed dramatically. His route took him over streets which were under construction, which meant that the ride was extremely rough. In addition, his bus had notably poor suspension, an uncomfortable driver's seat, and a steering ratio requiring greater effort for turns than that required for other buses owned by WMATA. Consequently, Mr. Hensley was bounced severely at certain points of contact, especially his left hand, the small of his back, and the undersides of his thighs. It was at that time that his psoriasis worsened: his skin began to dry out, peel and crack; his hands bled as he manipulated the steering wheel.

By August 15, 1977, the petitioner was forced to stop working. His treating physician, Dr. David Mitchell, prescribed medication to alleviate his symptoms, which included bleeding pustular lesions on the palms of his hands

and on the soles of his feet. By August 23, 1977, Mr. Hensley attempted to return to driving a bus although Dr. Mitchell had warned him driving a bus would worsen his condition. He was able to work only until September 5, 1977 when his hands began to crack and bleed. Dr. Mitchell took him off work, and again instituted conservative medical treatment. Because Dr. Mitchell's treatment was not completely effective, Mr. Hensley was subsequently treated with PUVA (photo-chemical) therapy under the direction of the chairman of the Dermatology Section of the Washington Hospital Center, Dr. Thomas P. Nigra. After Mr. Hensley stopped work, his condition improved and stabilized. (Pet. App. 96a, 97a).

Dr. Mitchell, who had been treating Mr. Hensley for psoriasis since 1970, testified that operating a bus under adverse road conditions had aggravated his underlying condition of psoriasis. Dr. Thomas P. Nigra, also Mr. Hensley's treating physician, testified that Mr. Hensley's skin condition was employment aggravated:

> When I saw him, he had physically disabling psoriasis of his left hand. He is a Metro Bus driver, and there is little question that he uses his hands in his work. Psoriasis is a capricious disease which waxes and wanes and comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the traumatic area. It is my opinion that using his hands in his work the way Mr. Hensley does at a bus driver could result in trauma and therefore flaring of his basic condition.
> (Pet. App. 84a, 85a.)

Employers medical witness, Dr. Robert Stolar, examined Mr. Hensley [Pet. App. 84(a)] on one occasion, May 18, 1978 nine months after Mr. Hensley had stopped work and after Mr. Hensley's condition had stabilized medically.

B. Procedural History

Respondent, William D. Hensley, filed a claim for temporary total disability benefits under 33 U.S.C. § 908(b). Following a denial of his claim by an Administrative Law Judge on November 28, 1978, respondent appealed the adverse decision to the Benefits Review Board, United States Department of Labor. The denial of claimed benefits was affirmed by the Benefits Review Board on October 31, 1979.

The United States Court of Appeals for the District of Columbia Circuit reversed the decision of the Benefits Review Board on March 17, 1981, holding that the Administrative Law Judge had failed to properly apply the statutory presumption favoring the claimant in a case where no substantial evidence was presented to contradict his claim.

ARGUMENT

The decision of the Court of Appeals is clearly correct. Moreover, this case raises no novel question of federal law, nor is there any conflict between the circuit court of appeals.

I.

THE COURT OF APPEALS, ADHERING TO THE "SUBSTANTIAL EVIDENCE" RULE, PROPERLY REVERSED THE DENIAL OF DISABILITY BENEFITS BY THE BENEFITS REVIEW BOARD

A careful reading of the majority decision of the Court of Appeals below reveals strict adherance to the well-established standards of judicial review.

Further review by this Court is thus not warranted, and the present petition for writ of certiorari should be denied.

The respondent's claim for compensation benefits was made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as made applicable to the District of Columbia 36 D.C. Code § 501 *et seq.* The standard of review for decisions made under the Act is well established. The factual findings and inferences made by the Administrative Law Judge must be affirmed if they are supported by substantial evidence, are not irrational, and are in accordance with the law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). However, the inferences drawn by the Administrative Law Judge must be reviewed in accordance with the judicial mandate that the Act be construed liberally in order to effectuate its remedial and beneficial purposes. *Great American Indemnity Co. v. Britton,* 186 F. Supp. 938 (D.D.C. 1960). Additionally, in the process of applying the Act to the circumstances surrounding the particular claim, "doubts, including the factual, are to be resolved in favor of the employee or his dependent family." *Friend v. Britton,* 220 F.2d 820 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 836 (1955); *Howell v. Einbinder,* 350 F.2d 422 (D.C. Cir.

1965); *J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967).

It has long been recognized that a reviewing body may not reweigh the evidence nor consider it de novo, but can only inquire whether there is substantial evidence in the record to support the findings of the Administrative Law Judge. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1971). However, the reviewing body is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *Howell v. Einbinder,* 350 F.2d 422 (D.C. Cir. 1965). Respondent submits that a review of the record below by the Court of Appeals revealed that the conclusions drawn by the Administrative Law Judge were irrational, not supported by substantial evidence in the record, not in accordance with the law of this jurisdiction, and were, therefore, properly reversed.

At the administrative hearing below, the respondent, William D. Hensley, presented overwhelming lay and expert testimony in support of his claim that his pre-existing skin condition was aggravated by his employment as a bus driver. As the Court of Appeals noted, Mr. Hensley's testimony concerning the flare-up of his psoriasis following adverse driving conditions was uncontradicted, as was the fact that his condition totally precluded his return to work as a bus operator.

At the administrative hearing, both of Mr. Hensley's treating physicians, noted dermatologists, testified that Mr. Hensley's psoriasis was aggravated by his employment duties, and had resulted in his inability to continue working as a bus operator. The Court of Appeals, after a review of this expert testimony, determined that the medical testimony was wholly consistent with the respon-

dent's theory of a work-related aggravation of his skin condition. The respondent clearly had a compensable claim, contrary to the conclusions of the Administrative Law Judge:

> In sum, Dr. Mitchell's overall testimony was consistent with at least two theories of work-related aggravation namely, that pustular lesions appeared initially as a response to the physical trauma of driving, or that driving aggravated existing lesions to the point that they cracked, bled and made driving impossible. It is possible both things happened. In either case work-related aggravation of an underlying psoriatic condition is clearly established on this record. It is, frankly, difficult for us to discern how the Administrative Law Judge and the Benefits Review case, work-related aggravation of an underlying psoriatic condition is clearly established on this record. It is, frankly, difficult for us do discern how the Administrative Law Judge and the Benefits Review Board could deny his claim based on this evidence, especially when the statute as construed by our court and others, *see* cases cited at pp. 5, 7-8, *supra,* presumes causality "in the absence of substantial evidence to the contrary." 33 U.S.C. § 920. (Pet. App. at 19a).

The Court of Appeals determined after reviewing 1) the uncontradicted testimony of the claimant, 2) the testimony of the two treating physicians, and 3) a leading medical text for attorneys, 6 P. *Cantor, Traumatic Medicine and Surgery for the Attorney,* 640-41 (1962)[1] that the Administrative Law Judge badly misunderstood the medical testimony, and that the Administrative Law Judge's final conclusion that Mr. Hensley's condition was inconsistent with his "entire theory of causation" was simply a *non sequitur.* (Pet. App. 25a).

In short, the factual conclusion drawn by the Administrative Law Judge was irrational, and not supported by the substantial evidence in the record. Reversal by the Court of Appeals under such circumstances was not only proper, but mandated by the directives of this Court in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965). Moreover, the Court of Appeals correctly determined that as the petitioner/employer had failed to produce substantial evidence to contradict either the presumption of compensability under 33 U.S.C. § 920(a) or the direct testimony of Mr. Hensley and his treating physicians reversal was required.

Section 20 provides, in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) That the claim comes within the provisions of this Act. 33 U.S.C. § 920(a).

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[1]Said treatise was cited in all of respondent's trial briefs and was, contrary to petitioner's assertions, a part of the record.

The presumption operates in favor of the claimant unless and until "substantial evidence" is presented by the respondent showing that the claimant's malady did not arise out of and in the course of employment. At that point, the presumption "falls out of the case." *Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935); *Swinton v. Kelly,* 554 F.2d 1075, 1082 (D.C. Cir. 1975), *cert denied,* 429 U.S. 820 (1976). In order to overcome the presumption of compensability under Section 20, the employer's "substantial evidence" must be "specific and comprehensive enough to sever the *potential* connection" between the disability and the work environment. *Parsons Corp. of California v. Director, Office of Worker's Compensation Programs,* 619 F.2d 38, 41 (9th Cir. 1980).

The Court of Appeals in the past has refused to "sustain the administrative findings merely because they are substantiated by some isolated evidence." *Friend v. Britton, supra,* 220 F.2d at 821.

In the case at bar, the only testimony adverse to the claimant was the testimony of Dr. Robert Stolar, a medical witness hired by the employer. Dr. Stolar examined Mr. Hensley on *one* occasion *nine months* after the claimant ceased work. In his first letter to the employer, Dr. Stolar indicated he was "unable to determine that it [Hensley's condition] was work-related or work aggravated." [Pet. App. 94(a).] At the administrative hearing, Dr. Stolar further testified that he could not "visualize" the pattern of injury that would have aggravated Mr. Hensley's condition:

> A: In my experience the pattern of work that he carried on does not produce psoriatic lesions by the only known traumatic mechanism which I mentioned for the Koebner phenomena, which

> would require a different type of injury than what I could visualize that he received at any time. [Pet. App. 76(a).]

As noted by the Court of Appeals, the record below evidenced a total lack of expertise on the part of Dr. Stolar in his erroneous description of the type of trauma Mr. Hensley was subject to as he drove his Metro bus over a rough construction route:

> More importantly, however, there is no evidence in the record that this third doctor had any particular experience or knowledge upon which to base his opinion regarding Hensley's "work pattern" as a bus driver, or his opinion regarding the "constant frictional pattern" to which Hensley was subjected on his particularly rough bus route during July and August of 1977. Dr. Stolar, while an accredited dermatologist, was not shown to have had any experience from which to estimate what sort of trauma Hensley was receiving from driving on his particular bus route, or which parts of the body received stress from such driving. At one point the Administrative Law Judge had to point this out:
>
> > Judge Giesey: Counsel, Dr. Stolar is an impressively credentialed member of a learned profession; but I do not think this is part of what he learned. I know as much about driving as the Doctor does . . .
>
> App. at 84. Therefore, since this doctor's ultimate opinion on work-relatedness was based entirely upon his "visualiz[ation]" was not derived from any particular experience of knowledge, we find that Dr. Stolar's opinion on the issue of

> aggravation is not entitled to the "substantial" weight which it must have to overcome the Congressionally mandated presumption. [Pet. App. 21(a)]. [Pet. App. 21(a)].

The Court of Appeals was not, as alleged by petitioner, improperly reweighing the medical evidence, but was properly reviewing the record as a whole below to determine whether substantial evidence existed to support the conclusions of the Administrative Law Judge. The Court of Appeals found Dr. Stolar's testimony failed to rise to the level of "substantial evidence" in light of the fact that 1) Dr. Stolar initially was *unable* to determine if Mr. Hensley's skin condition was work aggravated; i.e. could express no opinion; and 2) that Dr. Stolar's "visualization" of the kind of trauma involved in Mr. Hensley's operation of the bus was inaccurate, based on the *uncontradicted testimony* of an expert in the field: William D. Hensley, a bus operator of 32 years experience.

The Court of Appeals thus properly concluded that there was not "substantial" evidence sufficient to overcome either the presumption or the lay and expert testimony presented by the respondent, and correctly reversed the Decision and Order of the Benefits Review Board.

In so acting, the Court of Apeals followed long and well-established judicial directives, and grant of certiorari is thus inappropriate and unwarranted.

II

THE DECISION OF THE COURT OF APPEALS IS IN HARMONY WITH PREVIOUS DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT, AND WITH THOSE OF OTHER CIRCUITS

The decision of the Court of Appeals is not only correct, but also well reasoned, following both the statutory directives of the Longshoremen's and Harbor Workers' Compensation Act and the judicial interpretations thereof. It is well established that in cases arising under the Act the function of the Court of Appeals is to determine whether the Benefits Review Board properly adhered to its scope of review. In order to accomplish this, it is the duty of the Court to make an independent review of the record to decide whether the findings of the Administrative Law Judge were supported by substantial evidence. *Sun Shipbuilding & Dry Dock Company v. McCabe* 593 F.2d 234, 237 (3rd Cir. 1979). The scope of review has been described repeatedly by the various Courts of Appeals, and represents a consistent application of the same standard, whether the Courts affirmed lower decisions or reversed them. *See e.g. Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008 (5th Cir. 1981); *Director, Office of Workers' Compensation Programs v. National Van Lines,* 613 F.2d 972 (D.C. Cir. 1972); *John T. Clark and Son v. Benefits Review Board,* 621 F.2d 93 (4th Cir. 1980).

Petitioner in the case erroneously relies on a recent Third Circuit opinion, *Walker v. Universal Terminal and Stevedoring Corp.*, ____ F.2d ____ (3rd Cir. 1981), 13 B.R.B.S. 275 (1981). *Walker* is obviously inapposite to the case at bar. In *Walker,* the Administrative Law Judge had considered a death claim; the question was whether the claimant's death was caused solely by intoxication.

At issue was the weight to be given to reports made after Walker's death by physicians who had never treated him. It should be noted that the passage quoted by the petitioner is *dicta, not* a holding: What the appellate court might have done if the Administrative Law Judge had found differently from the way he did has relevance neither to the decision in that case, nor to the case at bar.

In the present case, the Court of Appeals held that the Administrative Law Judge had not only ignored the statutory presumption which favored the claimant (33 U.S.C. § 920) (*See e.g., Wheatley v. Adler,* 402 F.2d 307 (D.C. Cir. 1968) (en banc); *Bath Iron Works Corp. v. White, supra*), but that he had failed to consider properly the testimony of the two treating physicians, which deserved more weight than the testimony of one physician who examines the claimant but once. (*See Combs v. Gardner,* 382 F.2d 949 (6th Cir. 1967); *Shaw v. Harris,* Civ. No. 79-869 (D.D.C. Nov. 5, 1979). Moreover, the Court found that the Administrative Law Judge had "badly misunderstood the importance of the treating physician's testimony." [Pet. App. 23(a)]. In sum, the Court of Appeals in this case behaved exactly as did the Third Circuit Court in *Walker:* they both conducted the mandated review of the record as whole applying the same substantial evidence standard.

Moreover, the Third Circuit Court applied the same standard in *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs,* 629 F.2d 1327 (9th Cir. 1980), which was also cited by petitioner WMATA. Far from being in conflict with the case at bar, the Bumble Bee decision is another illustration of an appellate court conducting an independent review of the administrative record. The same holds true for the other Longshore Act case referred to by petitioner, *Todd Shipyards Corp. v.*

Donovan, 300 F.2d 741 (5th Cir. 1980). It is not at issue that the Benefits Review Board was upheld in these three cases, nor is it relevant. What is relevant is that there is no conflict, apparent or otherwise, among these decisions because the same standard was applied in each. Following petitioner's reasoning to its illogical conclusion would mean a conflict existed among the circuits whenever the Benefits Review Board was overruled by an appellate court, a result clearly contrary to the statutory and judicial principles governing such review.

As their clearly exists no conflict between the Circuit Courts of Appeals as to the correct judicial standard of review, there is no issue justifying the exercise of certiorari jurisdiction, and the petition at bar should be denied.

CONCLUSION

Respondent requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

Carolyn McKenney
Counsel of Record

Joseph H. Koonz, Jr.
Roger C. Johnson

Koonz, McKenney & Johnson
2020 K Street, N.W.
Suite 840
Washington, D.C. 20006
(202) 659-5500

Attorneys for Petitioner